

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

ENVIRONMENT TEXAS CITIZEN LOBBY, INC., .  
and SIERRA CLUB, .

Plaintiffs, .

VS. .

EXXONMOBIL CORPORATION, .  
EXXONMOBIL CHEMICAL COMPANY, .  
and EXXONMOBIL REFINING AND SUPPLY .  
COMPANY, .

Defendants. .

Civil Action  
No. H-10-CV-4969  
  
Houston, Texas  
February 10, 2014  
10:04 a.m.

. . . . .

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE DAVID HITTNER  
BENCH TRIAL  
**DAY 1 OF 13**

APPEARANCES:

FOR THE PLAINTIFFS:

Mr. Joshua R. Kratka  
Ms. Heather Govern  
NATIONAL ENVIRONMENTAL LAW CENTER  
44 Winter Street  
4th Floor  
Boston, Massachusetts  
617.747.4333  
917.710.5180  
FAX: 617.292.8057  
josh.kratka@verizon.net

Mr. David A. Nicholas  
20 Whitney Road  
Newton, Massachusetts 02460  
617.964.1548  
FAX: 617.663.6233  
dnicholas@verizon.net

PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS,  
TRANSCRIPT PRODUCED FROM COMPUTER-AIDED TRANSCRIPTION

APPEARANCES

(continued)

FOR THE PLAINTIFFS:

Mr. Philip Harlan Hilder  
Mr. William B. Graham  
HILDER & ASSOCIATES, PC  
819 Lovett Boulevard  
Houston, Texas 77006-3905  
713.655.9111  
FAX: 713.655.9112

ALSO PRESENT:

Ms. Mary Rock  
Paralegal

FOR THE DEFENDANTS:

Mr. Eric J. R. Nichols  
BECK REDDEN  
515 Congress Avenue  
Suite 1750  
Austin, Texas 78701  
512.708.1000  
FAX: 512.708.1002  
enichols@beckredden.com

Mr. Bryon A. Rice  
Mr. Fields Alexander  
Mr. William Brad Coffey  
BECK REDDEN  
1221 McKinney Street  
Suite 4500  
Houston, Texas 77010  
713.951.6256  
713.951.6220  
713.951.6274  
FAX: 713.951.3720  
brice@beckredden.com  
falexander@beckredden.com  
bcoffey@beckredden.com

APPEARANCES

(continued)

FOR THE DEFENDANTS:

Mr. Keith Courtney  
WINSTEAD PC  
401 Congress Avenue  
Suite 2100  
Austin, Texas 78701  
512.370.2813  
FAX: 512.370.2850  
kcourtney@winstead.com

ALSO PRESENT:

Mr. David Mantor  
In-house counsel  
EXXONMOBIL

Ms. Hien Luu  
Paralegal

COURT REPORTER:

GAYLE L. DYE, CSR, RDR, CRR  
515 Rusk, Room 8016  
Houston, Texas 77002  
713.250.5582

1	INDEX	
2		Page
3	PLAINTIFFS' OPENING STATEMENT BY MR. NICHOLAS	8
4	DEFENDANTS' OPENING STATEMENT BY MR. NICHOLS	50
5		
6		
7		
8	INDEX OF WITNESSES	
9	FOR THE PLAINTIFF:	
10	<b>RICHARD SHAE COTTAR</b>	
11	DIRECT EXAMINATION BY MR. KRATKA	98
12	CROSS EXAMINATION BY MR. RICE	154
13	REDIRECT EXAMINATION BY MR. KRATKA	186
14	RECROSS EXAMINATION BY MR. RICE	190
15	<b>DIANE AGUIRRE</b>	
16	DIRECT EXAMINATION BY MR. KRATKA	191
17	CROSS EXAMINATION BY MR. NICHOLS	207
18	<b>LUKE WILLIAM METZGER</b>	
19	DIRECT EXAMINATION BY MR. KRATKA	223
20	VOIR DIRE EXAMINATION BY MR. ALEXANDER	249
21	DIRECT EXAMINATION (CONTINUED) BY MR. KRATKA	249
22		
23		
24		
25		

## 1 PROCEEDINGS

2 February 10, 2014

3 THE COURT: All right. Everyone comfortable in the  
4 seats you're in now? I'm not going to make sure you stay there  
5 but -- okay.

10:04:26

6 Is that the corporate representative?

7 MR. NICHOLS: As I mentioned on Friday, we have a  
8 corporate representative, Mr. Gary Robbins.

9 THE COURT: Okay. Thank you. You can be seated.

10:06:20

10 Then we have Mr. Mantor back there, right?

11 MR. DAVID MANTOR: Yes, sir, your Honor.

12 THE COURT: All right. Out comes the timer.

13 All right. Court calls the case for trial Case  
14 Number 10-469, Sierra Club, et al., versus ExxonMobil.

10:09:44

15 Who represents the Plaintiffs? Just making a  
16 formal announcement, the three attorneys.

17 MR. NICHOLAS: Dave Nicholas.

18 MR. KRATKA: Josh Kratka.

19 MR. HILDER: Philip Hilder.

10:09:57

20 THE COURT: For the Defendants?

21 MR. NICHOLS: Eric Nichols.

22 MR. RICE: Bryon Rice.

23 MR. ALEXANDER: And Fields Alexander, your Honor.

24 MR. COURTNEY: Keith Courtney.

10:10:07

25 MR. COFFEY: Brad Coffey, your Honor.

1 THE COURT: Okay. You're with who?

2 MR. COFFEY: Beck Redden, your Honor.

3 THE COURT: Okay. Are you going to be in the trial?

4 MR. COFFEY: Yes, sir.

10:10:08 5 THE COURT: Let me add Mr. Coffey. All right, thank  
6 you.

7 MR. HILDER: Excuse me, Judge. Will Graham also will  
8 be making an appearance. He pulled up with flu this morning, so  
9 as soon as he recovers --

10:10:20 10 THE COURT: Is he an attorney?

11 MR. HILDER: Yes, he is.

12 THE COURT: His name is what?

13 MR. HILDER: Will Graham.

14 THE COURT: All right. When he sits down, I'll put  
10:10:25 15 him on there. Remind me tomorrow.

16 And again, Counsel, name?

17 MR. COFFEY: Brad Coffey, your Honor.

18 MS. GOVERN: I'm Heather Govern, your Honor, for the  
19 Plaintiffs.

10:10:33 20 THE COURT: Are you an attorney?

21 MS. GOVERN: Yes.

22 THE COURT: Okay. That's what I thought. All right.  
23 All right. It's not necessary, but does the Plaintiff desire to  
24 make an opening statement?

10:11:26 25 MR. NICHOLAS: Yes, your Honor.

1 THE COURT: All right. Go right ahead.

2 MR. NICHOLAS: Good morning, your Honor. Dave  
3 Nicholas for the Plaintiff.

10:11:38

4 THE COURT: Microphone up so everybody can hear you in  
5 the back.

6 MR. NICHOLAS: Dave Nicholas for the Plaintiffs.

7 THE COURT: I don't think it's on. It's not plugged  
8 in. Yeah, we got to plug it in.

9 (Discussion off the record.)

10:12:33

10 MR. NICHOLAS: Good morning, your Honor. Dave  
11 Nicholas for the Plaintiffs.

12 Your Honor, the Defendants, ExxonMobil  
13 Corporation and two wholly-owned subsidiaries, own and operate a  
14 petrochemical complex in Baytown, Texas, 25 miles east of  
15 Houston. It is a large, integrated plant. There are three  
16 plants within the complex. There's a refinery, an olefins  
17 plant, and a chemical plant.

10:12:47

18 It is the largest manufacturing facility in the  
19 United States. The emissions from the plant and other operating  
20 aspects of the plant are governed by permits issued under Title  
21 5 of the Clean Air Act. These are known as Title 5 permits or  
22 federal operating permits. These permits -- and we've  
23 identified these permits as -- for the three plants as  
24 Plaintiffs' Exhibits 191 to 215 and 222 to 252.

10:13:06

10:13:31

25 There are five federal operating permits for the

1 three plants, one for the refinery, one for the olefins plant,  
2 three for the chemical plant. These Title 5 permits incorporate  
3 by reference other state-issued permits known as new source  
4 review permits and prevention of significant deterioration --  
10:13:58 5 prevention of significant deterioration permits.

6 And these are Plaintiffs' Exhibits 113 through  
7 189, 216 through 221. So, the Title 5 -- the federal operating  
8 permits incorporate these permits and other regulations. The  
9 Clean Air Act prohibits violations of Title 5 permits. The  
10:14:20 10 Plaintiffs are bringing -- the two environmental groups are  
11 bringing this suit under the citizen suit provision of the Clean  
12 Air Act to enforce violations of these permits.

13 The citizens have the same remedies as the EPA  
14 has. Citizen supervision is not a limited remedy. Plaintiffs  
10:14:39 15 will prove that Exxon has violated its Title 5 permits thousands  
16 of times. Many of these violations lasted more than one day so  
17 that there are over 10,000 days of violations during the period  
18 at issue in this case, which is October 14, 2005, through  
19 September 3, 2014 -- 2013, excuse me.

10:15:02 20 Now, Plaintiffs will prove Exxon's violations  
21 with Exxon's own records, and there are three types of records  
22 that will prove the violations. One type of record is an  
23 emission event report filed with -- filed with TCEQ that is put  
24 online and is known as a STEERS Report.

10:15:24 25 An emission event is by definition an event that



1 is an event that results in unauthorized emissions; but when  
2 these emissions are above a certain quantity, Exxon and other  
3 facilities are required to put them online on what's known as  
4 the STEERS database, which stands for the State of Texas  
10:15:45 5 Environmental Electronic Reporting System.

6 The second type of records that prove these  
7 violations are records of emission events that do not rise to  
8 the level of being put on the STEERS database because they do  
9 not involve a reportable quantity but they are emissions  
10:16:05 10 nonetheless, and they by law must be recorded and maintained by  
11 Exxon on its facilities.

12 The third type -- well, let me just go back for  
13 one second. There are -- between the STEERS events and the  
14 recordable emission events, there have been 3,979 emission  
10:16:27 15 events during the period at issue. And many of those lasted  
16 more than one day. There have been 241 events that have made it  
17 onto the STEERS database. There have been 3,738 events that  
18 have been recordables and are on lists maintained by Exxon on  
19 site.

10:16:43 20 THE COURT: What about those 10,000? What was that  
21 10,000 number as it compares to the other numbers you just gave  
22 me?

23 MR. NICHOLAS: The 10,000 arises because there are  
24 multiple violations during each event, and that's for two  
10:16:56 25 reasons. One is sometimes the events go on for more than one

1 day. And so, there are more than -- so, there is more than one  
2 day of violation.

3 Under the Clean Air Act, every 24-hour period is  
4 a day of violation. Five days of violation would be -- you  
10:17:13 5 know, if it lasted a week, then it would be seven days of  
6 violation, that kind of thing. And then each of the events --  
7 or almost all of the events involved multiple violations.

8 THE COURT: Give me an example.

9 MR. NICHOLAS: An example would be a STEERS event that  
10:17:27 10 reports a carbon monoxide release, a sulfur dioxide release and  
11 a hydrochloric acid release. And so three different pollutants,  
12 three violations, three days of --

13 THE COURT: All right.

14 MR. NICHOLAS: The third type of record that proves  
10:17:48 15 Exxon's violations are known as deviation reports, and these are  
16 Plaintiffs' Exhibits 23 through 100. Twice a year Exxon is  
17 required and does file reports with the TCEQ that identifies  
18 violations of its Title 5 permits.

19 These are not only emission violations in that  
10:18:06 20 they don't -- they don't only reflect air contaminants being  
21 released into the air, these also include reporting violations,  
22 monitoring violations, testing violations, other things that are  
23 in the permit and are -- when they are violated, they are  
24 reflected in these deviation reports. So, those are the three  
10:18:27 25 types of records that establish these violations, and the Court

1 will hear from Exxon's own personnel who we'll call as a witness  
2 to talk about these types of records.

3 Now, the contents of records are not in dispute.  
4 The parties stipulated to the contents of them. We submitted to  
10:18:44 5 them in the pretrial order as an admission of fact, and these  
6 are -- the stipulated contents of the records are Plaintiffs'  
7 Exhibits 1 through 7E. They incorporate the underlying records  
8 that I just referred to, the STEERS Reports, the recordable  
9 reports, and the deviation reports.

10:19:06 10 Your Honor granted summary judgment on a  
11 relatively small number of violations. Those violations have  
12 been taken out of the stipulations. So, they are not reflected  
13 in Plaintiffs' Exhibits 1 through 7E.

14 Now, these records prove violations of, as I  
10:19:27 15 mentioned, limits on direct emissions that are in the permit,  
16 and the permit limits on direct emissions into the atmosphere  
17 are set to protect public health. And the records also prove  
18 operational reporting and monitoring requirements to minimize  
19 emissions and keep the complex operating safely.

10:19:51 20 The records prove repeat violations of the  
21 various standards. So, carbon monoxide limit will be violated  
22 more than once, that's a repeat violation; or the company failed  
23 to file a certain type of report on more than one occasion,  
24 that's a repeat violation. Repeat violations make our citizens  
10:20:14 25 suit actionable.

1 Now, Exxon is fond of saying that Plaintiffs'  
2 lawsuit is really a gotcha theory, that there's a paper trail of  
3 violations and that all we -- all the Plaintiffs did was look at  
4 the paper trail and bring a lawsuit. Having a paper trail of  
10:20:36 5 violations is not a defense. Having a paper trail of violations  
6 shows that there is a paper trail of violations and that the  
7 violations are established.

8 The citizens -- citizens don't have access to the  
9 Baytown Complex. There's no right for citizens to go in and  
10:20:53 10 inspect the plant. So, Congress set up a system where  
11 facilities like Exxon have to self-report its violations to TCEQ  
12 and EPA. Those violations are publicly available. In this case  
13 they're put on STEERS reports. Some of them -- some of them are  
14 available through a FOIA at the TCEQ office.

10:21:20 15 THE COURT: You mean Freedom of Information Act just  
16 for the record?

17 MR. NICHOLAS: Yes, Freedom of Information Act. And  
18 Congress was aware and knew that this was a basis for citizens  
19 to file suits under the citizen suit provision. And, in fact,  
10:21:35 20 this is the only way citizens can bring suit because they don't  
21 have any other information.

22 Now, Plaintiffs will prove that the violations  
23 are serious and of harm to the community and Plaintiffs'  
24 members. There have been many, many different chemicals that  
10:21:49 25 have been emitted during these emission events. These include

1 air pollutants that are EPA hazardous air pollutants such as  
2 benzene, 1,3-butadiene, hydrochloric acid, that kind of thing.

3           You'll hear from Plaintiffs' own -- excuse me,  
4 from Exxon's own personnel that carcinogens, chemicals that are  
10:22:17 5 respiratory hazards and chemicals that form ozone are emitted  
6 during emission events and during these violations.

7           The Court will also hear from Plaintiffs' members  
8 as to how they've been affected by the violations and what it's  
9 like to live next to the Exxon plant. Some of the members grew  
10:22:33 10 up in Baytown, some of them live nearby, some of them lived  
11 nearby and moved away and are grateful to feel better because  
12 they moved away, and some still have family back home and go  
13 visit them regularly.

14           And you will hear from these witnesses that none  
10:22:48 15 of them want to breathe Exxon's emissions and certainly none of  
16 them want to breathe illegal emissions. You'll also hear that  
17 they fear that the plant will explode because it's not being run  
18 correctly.

19           Now, the members are not suing for damages.  
10:23:02 20 They -- so, this is not a personal injury suit. And they joined  
21 Environment Texas and Sierra Club because they are working to  
22 fight air pollution and they are supporting the groups in this  
23 enforcement case.

24           You'll hear from -- the Court will hear from --  
10:23:21 25 the Court will have before it Exxon's own modeling of emission

1 events and violations which will show that regulatory thresholds  
2 and levels have been exceeded on occasion. The Court will hear  
3 from Plaintiffs' expert, Dr. Edward Brooks, who is -- who will  
4 look at the -- who will testify that looking at the emissions of  
10:23:45 5 individual chemicals doesn't tell the whole story, that a more  
6 appropriate way to look at and assess the impact of these  
7 violations is to consider the synergistic effect and the fact  
8 that a variety of chemicals are being put into the atmosphere at  
9 the same time and mixing, basically, a chemical soup idea and  
10:24:06 10 that they're mixing not only together in one emission event from  
11 Exxon but also mixing together -- I'm sorry, that the various  
12 emissions and violations and the pollutants emitted during the  
13 violations mixed together in a soup not only just from Exxon's  
14 own emissions but from other industrial sources in the area and  
10:24:24 15 that Exxon contributes to that problem.

16 Now, Dr. Brooks is not a treating doctor. He's  
17 got --

18 THE COURT: He's an MD or PhD?

19 MR. NICHOLAS: He is a medical doctor. He's an MD.

10:24:36 20 THE COURT: Because you also have a pediatrician, I  
21 remember.

22 MR. NICHOLAS: Same person.

23 THE COURT: Same person?

24 MR. NICHOLAS: Right.

10:24:42 25 THE COURT: He's not a treating physician?

1 MR. NICHOLAS: He did not treat the Plaintiffs'  
2 members. That's right. So he's going to testify on the health  
3 risks posed by the chemicals emitted.

4 THE COURT: Is there any -- now, again, I mentioned to  
10:24:52 5 both sides don't assume by any questions I ever ask or my  
6 perceived hostility that I'm leaning one way or another. It's  
7 for me to get to the bottom. Are you going to have anybody  
8 coming and saying, Well, such and such is my patient and these  
9 are the symptoms and that's what -- and link it up somehow to  
10:25:11 10 the alleged pollution problem?

11 MR. NICHOLAS: We will not have any treating doctors.  
12 Dr. Brooks will testify that the symptoms described by the  
13 Plaintiffs' members are consistent with the effects of the type  
14 of pollution being emitted.

10:25:24 15 THE COURT: This gentlemen, again, I don't know, is he  
16 a practicing pediatrician or --

17 MR. NICHOLAS: Yes.

18 THE COURT: -- is he an academic pediatrician?

19 MR. NICHOLAS: Both.

10:25:32 20 THE COURT: Okay, Thank you. What -- where is he --

21 MR. NICHOLAS: University of Texas, San Antonio.

22 THE COURT: San Antonio. Okay, thank you.

23 MR. NICHOLAS: Yeah. And he will testify on the  
24 likely impact on the community and the members of the  
10:25:43 25 violations; and he will, as I mentioned, testify that the

1 members' symptoms are consistent with exposure to Exxon's  
2 chemicals. Nearly 10 million pounds of unauthorized emissions  
3 have been reported by Exxon.

4 THE COURT: 10 million pounds over how much time?

10:25:59 5 MR. NICHOLAS: Over since -- in the period at issue,  
6 which is approximately at this point eight years.

7 THE COURT: Okay.

8 MR. NICHOLAS: Now, that is as reported by Exxon.  
9 That amount, we will show, is understated. And that is because  
10:26:13 10 many of the violations involve flaring. And the EPA and the  
11 TCEQ allow Exxon and other facilities to report the amount  
12 coming out of its flares using a certain formula.

13 THE COURT: Flares, by that, I mean, is that the fire  
14 that you see burning at the top of some refinery?

10:26:35 15 MR. NICHOLAS: Yes.

16 THE COURT: Okay.

17 MR. NICHOLAS: Those are flares. And there are many  
18 flaring events that result in violations and they're reported by  
19 Exxon. Now, the amount that comes out of those flares is  
10:26:47 20 determined by a formula that EPA and TCEQ set and it's -- and  
21 there's no question that Exxon is allowed to report its -- the  
22 amount of pollution coming out of the flares consistent with  
23 that regulation.

24 But what we will show is that that regulation  
10:27:04 25 makes assumptions and allows Exxon and other facilities to



1 report its pollution in a way that understates and undercounts  
2 the amount that's actually coming out of the flares. And when  
3 that's taken into account, it shows that, in fact, the pollution  
4 that's coming out of the flares and these emission events and  
5 the violations alleged in this case is actually greater than  
6 reported. And that will have an effect; and you will hear  
7 Dr. Ran Sahu, an engineer, talk about that for the Plaintiffs.

8 That has an effect on Exxon's modeling of  
9 emissions. Exxon will sometimes be asked by TCEQ to model the  
10 effect of its violations, and you'll hear Dr. -- you'll hear  
11 Randy Parmley testify about that, but Mr. Parmley is modeling  
12 these emissions and estimating impacts of these emissions based  
13 on -- often based on flaring incidents that understate the  
14 amount of pollution coming out of the flares.

15 You will also hear from Dr. Sahu and Dr. Brooks  
16 that the odds of the pollution plume actually hitting an air  
17 monitoring station that are located in parts of Harris County  
18 are very slim. So it's difficult to actually monitor the -- in  
19 real-time monitoring the actual effect of these violations.

20 You'll also hear from Exxon. We anticipate that  
21 you'll hear from Exxon, and we -- indeed, we heard it on  
22 Friday: that these violations that Plaintiffs are bringing  
23 before the Court are not serious. Exxon will say that they're  
24 doing well in a lot of aspects of the permit compliance, in  
25 complying with their permits; and they're going to argue that

1 overall their emissions are down.

2 THE COURT: Are down?

3 MR. NICHOLAS: Yeah. That over the course of a  
4 decade, the amount of emissions that they've put out from the  
5 Baytown Complex have decreased.

6 THE COURT: Are they down enough?

7 MR. NICHOLAS: Well, no, they're not down enough; and  
8 it does not excuse violations of their permit. So they may  
9 have --

10 THE COURT: You mean the violations in the past?

11 MR. NICHOLAS: It does not -- excuse me?

12 THE COURT: Doesn't -- doesn't --

13 MR. NICHOLAS: No.

14 THE COURT: -- excuse the violations in the past?

15 MR. NICHOLAS: It doesn't -- it doesn't excuse  
16 violations in the past, nor does it -- nor does it excuse  
17 violations that will occur in the future unless -- unless the  
18 Court orders otherwise.

19 So there are, for instance, hourly limits --

20 hourly limits on the amount of -- or pounds per hour limits on  
21 the amount of pollution that can be emitted from the plant. And  
22 when those are violated, the people living near the plant are,  
23 obviously, greatly affected because they're breathing a -- I'll  
24 say a great amount of pollution in a short period of time, that  
25 doesn't do -- the argument that an overall, say, yearly decrease

1 in emissions is cold comfort to people -- to the people who live  
2 in the plant and get a blast of an illegal air emission event.

3 Now, Exxon will also -- Exxon will also say that  
4 some of these emission events are not serious because they  
10:30:27 5 involved a small amount of emissions, and you will hear from  
6 Exxon's own personnel and Plaintiffs' expert, Keith Bowers, an  
7 engineer, that, in fact, these emission events are not known  
8 beforehand whether they're going to be big or small. So, they  
9 all have to be prevented. You'll also hear that the gasses  
10:30:49 10 emitted are flammable causing an explosion risk. And that's  
11 regardless of whether the emission is big or small. And you'll  
12 also hear that --

13 THE COURT: In other words, an explosion risk, isn't  
14 the flaring, a flame enough to ignite it if it was going to  
10:31:05 15 explode?

16 MR. NICHOLAS: No, the flares are elevated. So a lot  
17 of the emission events that we're talking involve leaks which  
18 are lower down. And so --

19 THE COURT: Any igniting has to be done lower down.  
10:31:20 20 If any, if it ever occurs, igniting has to occur lower down.  
21 The flaring from the top won't ignite --

22 MR. NICHOLAS: Well, the flare from the top of -- I  
23 believe the flame from the top of the flare -- I can't answer  
24 that off the top of my head with certainty, but I believe that  
10:31:33 25 poses less of a risk than anything below the flare height

1 because it's very high because there are a lot of things that  
2 could cause the plant -- there's a lot of things that could  
3 cause an ignition such as a car, cigarettes, static electricity,  
4 other things. So, that's a -- obviously, a tremendous risk at  
10:31:53 5 the plant, and even a small amount of a flammable pollutant can  
6 trigger that risk.

7 Now, there are many, many of these recordable  
8 smaller events. Well, they're only smaller relative to the ones  
9 reported on the STEERS events, but some of them are individually  
10:32:14 10 quite large. And all totaled, they still have put into the  
11 atmosphere more than a million pounds of pollution. And they  
12 show, because they happen over and over again, that the plant is  
13 operated, maintained, and designed inadequately.

14 Now, Exxon will say that some of the violations  
10:32:33 15 aren't serious because they only involve recordkeeping or  
16 monitoring, but all those requirements are in their permits for  
17 a reason. A shoddy recordkeeping should not be tolerated, and  
18 the fact that reports can't be filed on time is not reassuring  
19 for the people who live -- who live near the plant because it  
10:32:54 20 shows that -- well, really, when a -- such a large facility,  
21 such a large petrochemical plant is being entrusted to somebody  
22 to run, it should really be run correctly.

23 Now, the permit conditions -- the permit  
24 conditions allow Exxon -- they govern Exxon's operations. They  
10:33:18 25 allow Exxon to operate. They allow them to profit. They are

1 the rules that Exxon must follow in order to operate. And they  
2 could have appealed those permits. But the fact is that they've  
3 accepted those permits, they operate on them, and they must  
4 comply with the permits.

10:33:35

5 Now, these -- the Clean Air Act is a strict  
6 liability statute, and the permits themselves countenance no  
7 excuse for violations. The Texas Administrative Code, 30, Texas  
8 Administrative Code, 122.143, Sub 4 -- Subparagraph 4, provides  
9 that every permit, including Exxon's permits, have the following

10:33:59

10 provisions in them: "It shall not be a defense in an  
11 enforcement action that it would have been necessary to halt or  
12 reduce the permitted activity in order to comply with the permit  
13 terms and conditions of the permit." So, if they had to -- if  
14 the facility has to shut down in order to comply with the  
15 permit, that's what it has to do.

10:34:19

16 Now, we heard on Friday that Exxon maintains that  
17 it is difficult or impossible to operate its permits -- to  
18 operate its plant in a way to always be in compliance with its  
19 permits. But that's just saying -- that's, basically, asserting  
20 an inevitability defense, that it is inevitable --

10:34:38

21 THE COURT: So how do they correct it?

22 MR. NICHOLAS: They correct it by -- and we will put  
23 on expert testimony about this.

24 THE COURT: I understand. We all know an opening  
25 statement is what you anticipate the evidence will show.

10:34:48

1 MR. NICHOLAS: Right. Yes. They will show -- we will  
2 show that by spending an additional \$90 billion a year in annual  
3 maintenance spending, they could prevent these, and by putting  
4 in certain capital projects, they could have prevented these  
5 violations. So --

10:35:03

6 THE COURT: "Capital" meaning new construction?

7 MR. NICHOLAS: Correct.

8 THE COURT: Would that entail shutting down the  
9 operation for awhile?

10:35:14

10 MR. NICHOLAS: Not in its entirety, no. And if Exxon  
11 makes this a priority, they spend the money, if they have the  
12 personnel, they do it correctly, there would not be these  
13 violations. Now, there are systemic problems at the plant that  
14 are causing these violations.

10:35:38

15 There are certain units that are problem units.  
16 There are certain types of equipment that keep breaking. It has  
17 many, many leaks. There have been 350 fires that have broken  
18 out, leading to violations and other common, recurring problems  
19 that can be addressed. Now --

10:35:58

20 THE COURT: 300 some-odd fires, that's, what, over the  
21 whole --

22 MR. NICHOLAS: Yes.

23 THE COURT: -- multi-year span?

24 MR. NICHOLAS: Correct.

10:36:05

25 THE COURT: Now, I guess those fires haven't ignited

1 anything, thank goodness, right?

2 MR. NICHOLAS: Correct. Well, they haven't --

3 THE COURT: Or have they -- there have been no  
4 explosions or anything out there?

10:36:15 5 MR. NICHOLAS: Correct. There has not been an  
6 explosion. Exxon will dispute that its maintenance practices  
7 are inadequate, and we anticipate that you will hear about their  
8 maintenance practices in detail. I'm sure that there will be a  
9 lot of discussion of programs with a lot of jargon being thrown  
10:36:40 10 in and perhaps some photographs and perhaps pictures of people  
11 in hardhats and that kind of thing.

12 But when the Court listens to that detail -- the  
13 Court has before it the result of that maintenance program, the  
14 current maintenance program, the inadequate maintenance program.  
10:36:58 15 And the result before it is approximately 4,000 emission events  
16 and over 10,000 days of violations. That --

17 THE COURT: Is it getting any better over the years?

18 MR. NICHOLAS: It is not -- it is not getting better  
19 at the refinery, which has -- which has held steady at its total  
10:37:15 20 number of emission events, reportables and recordables; and the  
21 olefins plant has increased the number of reportable and  
22 recordable emission events.

23 So it is still inadequate and, again,  
24 anticipating the large number -- the large amount of detail that  
10:37:40 25 we anticipate that we believe Exxon will be going into that the

1 Court will have before it, the actual record of -- the record of  
2 violations.

3 THE COURT: All right. And part of your case, will it  
4 or will it not make suggestions on what must be done?

10:37:56 5 MR. NICHOLAS: Yes.

6 THE COURT: Okay.

7 MR. NICHOLAS: Exxon has also suggested that we should  
8 not be suing for events that occurred during Hurricane Ike and  
9 falsely stated on Friday that the Plaintiffs wanted the plant to  
10 continue to operate during the hurricane, which is not true.

10:38:12 11 What the Plaintiffs wanted was when the plant  
12 shut down and when the plant started up again not to violate its  
13 permits terms. There is an act of God defense that can be  
14 asserted, and it's an affirmative defense. And the Eastern  
10:38:35 15 District of Texas wrestled with this actually in a Hurricane Ike  
16 case called Select -- Century Select Insurance from 2011.

17 And there is -- there are hoops that Exxon has to  
18 go through to prove that -- prove up that affirmative defense.  
19 The bottom line is hurricanes are anticipated, and hurricane  
10:38:55 20 plans have to be put in place so that when they shut down and  
21 start up there aren't tremendous emissions and violations of its  
22 permits.

23 Exxon will also say that citizens have no role in  
24 this -- have no role here because the agencies are aware of the  
10:39:11 25 violations and have been addressing it or, at least, aware of



1 them. They either can or -- they either may or may not address  
2 them, but they're aware of them. But this Court has already  
3 ruled.

4 It is true that every emission cited by  
10:39:24 5 Plaintiffs were self-reported by Defendants to the TCEQ and that  
6 TCEQ had authority and in some cases did take enforcement action  
7 against Defendants for these emissions. And Defendants are  
8 correct that citizen suits are a way of second-guessing this  
9 TCEQ action or inaction.

10 But that is precisely the point. Citizen suits  
10:39:40 11 were intended to be a mechanism for the public to second-guess  
12 the adequacy of an agency's response to Clean Air Act  
13 violations --

14 THE COURT: That's why we're at trial here.

10:39:53 15 MR. NICHOLAS: Right. -- as an antidote to regulatory  
16 capture.

17 THE COURT: It's not an absolute bar.

18 MR. NICHOLAS: Correct. Now, because citizens do not  
19 have access to the plant, every citizen suit -- as I mentioned  
10:40:07 20 before, every citizen suit is based on public records. So every  
21 single citizen suit has the same issue, that an agency is aware  
22 of the violations that are being alleged in the suit.

23 THE COURT: State or federal or both?

24 MR. NICHOLAS: Both, well -- both. And, again, so  
10:40:34 25 that's -- that puts -- that puts into context the role of

1 citizens with respect to these kinds of lawsuits. Again, the  
2 record on TCEQ enforcement is before the Court, 4,000 emission  
3 events causing approximately 10,000 violations. So, again,  
4 whatever TCEQ did, that is the record before the Court. That is  
10:41:00 5 the amount of violations it is allowed over this period.

6 And as we already mentioned, there has not been a  
7 stop to the violations. They've been continuing. The Court  
8 will also hear about poorly written and ineffective enforcement  
9 orders and other shortcomings of TCEQ.

10:41:19 10 THE COURT: Enforcement orders by who?

11 MR. NICHOLAS: TCEQ.

12 THE COURT: In other words, where you say -- you're  
13 saying the state agency fell down a bit?

14 MR. NICHOLAS: More than a bit.

10:41:29 15 THE COURT: More than a bit.

16 MR. NICHOLAS: More than a bit, that they have wholly  
17 failed to address the problems at the plant, that there have  
18 been huge number of violations under their watch, and that  
19 they've actually cut a recent deal that allows the facility to  
10:41:44 20 keep violating. And so that is, obviously -- it's a bigger  
21 problem.

22 THE COURT: So that's the position. Now, is there  
23 any -- what federal agency is involved here, probably to the  
24 lesser extent? You're saying it's primarily a state policing?

10:41:59 25 MR. NICHOLAS: Yes. EPA did take an enforcement

1 action against Exxon and other facilities in a so-called  
2 refinery enforcement initiative back in 2005, and there's a  
3 consent decree addressing certain limited aspects of the plant.

4 It is not an overreaching, overarching consent  
10:42:17 5 decree. It does not have anything to do with the olefins plant  
6 or the chemical plant. It has only a limited amount of -- to do  
7 with the refinery, and any of the violations that we had alleged  
8 that might have overlapped with the consent decree, this Court  
9 has already ruled against.

10:42:36 10 So those are not in the case. And we've actually  
11 entered into a stipulation setting out separately those  
12 violations, which, I believe, is Plaintiffs' Exhibit 8. So  
13 those have been taken out and are not reflected in the  
14 violations tables.

10:42:54 15 Now, when the Court hears all the evidence, we  
16 believe that it will establish that Plaintiffs should be  
17 granted -- are entitled to grant -- that the Court should grant  
18 the relief they seek which -- and that relief is a declaratory  
19 judgment, an injunction to stop violating the Title 5 permits,  
10:43:15 20 special master to be appointed to assure compliance at the  
21 plant, and a penalty to be imposed.

22 Economic benefit, which is the -- which is a  
23 concept that strips the amount that the plant -- that the  
24 company has benefitted from its non-compliance with its permits,  
10:43:37 25 by not spending the money to come into compliance with its

1 permits. The company has benefitted from that financially.  
2 That amount is a significant amount in this case, has a  
3 significant component in the penalty calculation.

4 THE COURT: The dollar amount is what? It was -- they  
10:43:52 5 were initially over a billion. It's now, what, 600 and  
6 something million?

7 MR. NICHOLAS: It's approximately 630 million. It was  
8 never a billion because there was certain overlapping  
9 violations, and we never asserted over a billion dollars. And  
10:44:07 10 so the penalty that is warranted in this case is large because  
11 of economic benefit, because of the seriousness of the  
12 violations, because of the public harm, the public risk.

13 THE COURT: Now, special master, at the end of the  
14 case, are you going to be in a position to recommend somebody?

10:44:25 15 MR. NICHOLAS: Yes. But we have not actually come up  
16 with a name and did not anticipate that that could be an option.  
17 I think --

18 THE COURT: Well, I'm just saying the same thing. I  
19 may ask Exxon the same thing, if, indeed, I believe that is, who  
10:44:42 20 might they suggest, that if you care to reserve that right at  
21 the end, fine. I'm saying you're going to get that question.

22 MR. NICHOLAS: Okay. That's fair. We can come up  
23 with a name.

24 THE COURT: What I'm saying to both sides, you don't  
10:44:56 25 have to, but you're going to get that question.

1 All right, go on.

2 MR. NICHOLAS: We anticipated that that would be --  
3 that that would be dealt with after the decision whether or not  
4 to issue the -- to appoint a special master. And as we  
10:45:10 5 discussed last week, a hundred thousand could be ear-marked for  
6 beneficial projects that -- that can be arrived -- that can be  
7 designated by the Court, and the balance goes to a treasury fund  
8 that can be accessed by EPA for enforcement activities.

9 Now, I would just -- in concluding here, I would  
10:45:32 10 just like to go through the counts in the complaint quickly, and  
11 I would just like to just draw the Court's attention to what the  
12 stipulated tables look like.

13 THE COURT: What exhibit number?

14 MR. NICHOLAS: These are -- I'll go count by count  
10:45:51 15 so --

16 THE COURT: Which book -- whose book are they in?

17 MR. NICHOLAS: First -- this would be the first book.

18 THE COURT: Those are Plaintiffs' books. The Defense  
19 is on disk, right?

10:46:04 20 MR. NICHOLS: Yes, sir.

21 THE COURT: All right. Which ones?

22 MR. NICHOLAS: Number 1.

23 THE COURT: Book number 1.

24 MR. NICHOLAS: I was going to throw it on the ELMO.

10:46:12 25 THE COURT: Okay. That's fine. Let's do it that way.

1 Let me -- I've got a screen here as well as up there. All  
2 right.

3 MR. NICHOLAS: All right. So the first --

4 THE COURT: On -- do we have the screens on back  
10:46:28 5 there, Ellen?

6 THE CASE MANAGER: Yes, sir.

7 MR. NICHOLAS: All right. So the first table, we've  
8 got this -- so Count 1 of the complaint alleges --

9 THE COURT: That's a little intimidating right now.  
10:46:47 10 How many counts are you going to go over? I mean, the type is  
11 small, and how many pages? I can get a feel for what you have.

12 MR. NICHOLAS: I was just going to give you a feel for  
13 it.

14 THE COURT: Give me an example. Okay.

10:47:01 15 MR. NICHOLAS: I'll give you a feel for it. Okay.  
16 The first count is --

17 THE COURT: Is that focused in, by the way, Ellen, do  
18 you think? Is it focused?

19 THE CASE MANAGER: Not to me but --

10:47:09 20 THE COURT: Okay. Do you want to help with the focus?  
21 We'll get it straight the first time. We'll sharpen that up if  
22 we can a bit.

23 MR. NICHOLAS: All right.

24 THE COURT: All right. Yeah. Sometimes when you zoom  
10:47:45 25 in or out, it helps. Yeah, that may be the best we can get for

1 right now. If you have a little pointer there or a pencil or  
2 something, just point out --

3 MR. NICHOLAS: Okay.

4 THE COURT: -- exactly where you want us to look.

10:47:54 5 MR. NICHOLAS: In Count 1, this claim is that all  
6 upset -- all upset emissions from the refinery are violations.

7 THE COURT: Where are you looking -- I'm sorry. Where  
8 are you looking at?

9 MR. NICHOLAS: First, I'm just describing the count,  
10:48:05 10 which is upset events at the refinery, Count 1.

11 THE COURT: How many counts are there? I haven't  
12 looked at them.

13 MR. NICHOLAS: Seven.

14 THE COURT: Seven. Okay.

10:48:13 15 MR. NICHOLAS: So, the first count is there -- that  
16 all upset events at the refinery have yielded violations that  
17 result in unauthorized, illegal emissions, and that is because  
18 the permit states, "This permit does not authorize upset  
19 emissions, emissions from activities that occur as a result of  
10:48:30 20 upsets or any unscheduled, unplanned emissions associated with  
21 an upset. Upset emissions are not authorized, including  
22 situations where that upset is within the flexible emission cap  
23 or an individual permit emission limit." So --

24 THE COURT: Just explain what --

10:48:47 25 MR. NICHOLAS: Okay.

1 THE COURT: This is all across here.

2 MR. NICHOLAS: Right. So --

3 THE COURT: From the left to the right, because when  
4 you go over that, the contaminant is listed at the right. Is  
10:48:57 5 one through eight, what is that, one incident?

6 MR. NICHOLAS: Yes.

7 THE COURT: Okay.

8 MR. NICHOLAS: One through eight is one incident.

9 THE COURT: On what date?

10:49:04 10 MR. NICHOLAS: And it is on --

11 THE COURT: 10-14-2005?

12 MR. NICHOLAS: Right. So you got a start date, the  
13 end date -- okay. First, you've got -- in some occasions we  
14 have a tracking number, which, if you recall, I referred to  
10:49:20 15 STEERS reports. These are STEERS report numbers generated by  
16 TCEQ. This is our case Bates number. So the underlying  
17 documents have been put into evidence or into -- into the  
18 exhibit books.

19 So, this STEERS report is reflected in these  
10:49:50 20 Bates numbers ranges. Here's the start time -- start date and  
21 time of the emission event, end date and time, how long, the  
22 duration, how long the event took.

23 THE COURT: All right. Now, you're using military  
24 time here or not?

10:50:05 25 MR. NICHOLAS: Well, this is actually --



1 THE COURT: You're using -- first, at the top it says  
2 2:47 and the ending is 10:11. Is it a.m., p.m., or is that  
3 military time?

4 MR. NICHOLAS: Military.

10:50:19 5 THE COURT: All right. Duration is what, 17 minutes  
6 or 17 hours?

7 MR. NICHOLAS: 17 hours. So it's --

8 THE COURT: 17 hours?

9 MR. NICHOLAS: Right. Hours and minutes.

10:50:26 10 Authorization is the permit that governs this emission or lack  
11 of a permit, and that will -- that's self-explanatory from that  
12 column. The unit number -- the unit at the plant that is  
13 involved in the emission event, again this is all as reported by  
14 Exxon.

10:50:45 15 These are just Exxon's records copied onto a  
16 summary document. The emission point is the -- is a more  
17 specific location where the pollution is coming from. Some of  
18 them are numbered. EPN stands for emission point number, which  
19 is just another reference. The contaminant is the actual  
10:51:06 20 pollutant that's being emitted during this violation. So,  
21 you've got ammonia and carbon monoxide, hydrogen cyanide.

22 THE COURT: Now, when you say particulate matter, what  
23 am I going to learn that is? Is that -- what is particulate  
24 matter?

10:51:21 25 MR. NICHOLAS: Particulate matter is a measure -- it's

1 literally particles.

2 THE COURT: And that's dirt in there?

3 MR. NICHOLAS: Soot.

4 THE COURT: Soot.

10:51:28 5 MR. NICHOLAS: Soot, smoke, that kind of thing.

6 THE COURT: Okay. Got it.

7 MR. NICHOLAS: Total VOC -- VOCs, which you'll hear a  
8 lot about in this case are volatile organic compounds. And  
9 since the refinery permit regulates them as a -- as a group on  
10:51:47 10 occasion, they -- we have lumped together the VOCs to give one  
11 total. We agreed that that -- we agreed with Exxon on that.

12 THE COURT: And these are matter of pounds in the air?

13 MR. NICHOLAS: Yes. And the next column shows how  
14 much is released in pounds.

10:52:03 15 THE COURT: All right. So the first thing is -- for  
16 is -- the first one is 1,125 pounds?

17 MR. NICHOLAS: Yes.

18 THE COURT: The next one, carbon monoxide, 283,767  
19 pounds?

10:52:18 20 MR. NICHOLAS: Yes.

21 THE COURT: All right.

22 MR. NICHOLAS: Then the next column is the reported  
23 emission limit in pounds per hour. So that's the permit limit.

24 THE COURT: In other words, they're not supposed to  
10:52:31 25 put anything in the air?

1 MR. NICHOLAS: Right. This shows -- this shows zero.  
2 Sometimes it shows another number. A lot of times it shows  
3 zero. Then there's a cause as written by Exxon.

4 THE COURT: Yeah, move it over, please.

10:52:44

5 MR. NICHOLAS: Oh, I'm sorry. It cut off. Then,  
6 there's a cause column.

7 THE COURT: Well, take a look at that 263 -- or 83.  
8 Why don't we see what that is. Read that, if you would.

10:52:59

9 MR. NICHOLAS: "FCCU 3 C, boiler, tripped off line at  
10 2:47 and again shortly after start-up at noon. Cause of event  
11 currently under investigation." So that's a --

12 THE COURT: Well, when it's under investigation, do  
13 you ever get results? What was the result, for instance, to  
14 that one event?

10:53:14

15 MR. NICHOLAS: I don't recall off the top of my head,  
16 but --

17 THE COURT: And you don't need to. What I'm saying,  
18 that's a question people ask. Okay?

19 MR. NICHOLAS: Right.

10:53:20

20 THE COURT: It seems a lot number-wise into the air,  
21 okay? And that they have under investigation. Now, somewhere  
22 they investigated and had to make a report, right?

23 MR. NICHOLAS: Yes.

24 THE COURT: Okay.

10:53:31

25 MR. NICHOLAS: It's -- it is, I believe, almost always

1 the case that eventually that -- usually the cause column is a  
2 little more certain than that, so -- or it will just say  
3 something tripped because of -- and then there will be an  
4 explanation.

10:53:47 5 And so the way these STEERS reports work is that  
6 there's an initial report and then there's an opportunity for  
7 the company to file an additional report two weeks later that  
8 becomes the final report and they usually have a more certain  
9 explanation of the cause. That's the typical way it happens.

10:54:04 10 So, all of these in Count 1, everything in here  
11 is a violation because no upsets are allowed at the refinery  
12 under its permit. And these are -- those were STEERS events.

13 THE COURT: Okay. What do you anticipate -- what's  
14 the defense to that? Oh, I know I'll hear it, but what's their  
10:54:27 15 defense to that? It looks -- on the paper it looks egregious.

16 What's the defense? Certainly we'll hear from it, and then you  
17 respond right now, if you would. Tell me what the evidence --

18 MR. NICHOLAS: Do both sides? I can do that. I can  
19 do that.

10:54:39 20 THE COURT: No, no. Just tell me what argument you're  
21 going to have to meet because it's discovery. In federal cases  
22 you know what's coming, right?

23 MR. NICHOLAS: I do know what's coming. The argument  
24 is TCEQ knew about it and cared about it, didn't care about it,  
10:54:54 25 whatever. They either -- they penalized us. They didn't

1 penalize us. There's not a claim that these aren't violations.  
2 There's only a claim that they haven't -- that we shouldn't --  
3 that Plaintiffs shouldn't be the one dealing with it.

4                   These are -- these -- these statistics only arise  
10:55:12 5 -- these reports only arise because there's an unauthorized  
6 emission. If it wasn't unauthorized, it wouldn't be on -- in a  
7 report, and it wouldn't be on this page. So it --

8                   THE COURT: So your position is they reported it and  
9 nothing was done or they were penalized for it and they moved  
10:55:30 10 on.

11                   MR. NICHOLAS: Right.

12                   THE COURT: I'm not -- I'm not putting words in their  
13 mouth, but I'm just saying is that -- is that generally the  
14 position we're going to hear?

10:55:38 15                   MR. NICHOLAS: Yeah. That's generally the position  
16 that you're going to hear or you're also going to also hear --  
17 as I mentioned, Exxon will also argue that some of these have  
18 been small. You know, there's been a lot of small emissions, a  
19 half a pound of this, ten pounds of that, which is why I brought  
10:55:53 20 up earlier about how these pollutants are flammable.

21                   When you add them all up, they are -- they're  
22 more than a million pounds. You never know what's going to come  
23 out at any given time during an emission event. So if you don't  
24 care about the small ones, it could become large. It shows that  
10:56:09 25 there's an inattentiveness to maintenance, a shoddily run plant.

1 And that's what you're going to hear about the smaller events.  
2 And the chart -- let's see. Exhibit 1B.

3 THE COURT: Let me ask you this: Are we going to have  
4 any -- and we don't need it -- necessarily need it. I'm just  
10:56:21 5 asking. Any input from the state agency which your position is,  
6 I'm gathering, just didn't look -- watch them close enough?

7 MR. NICHOLAS: Well, there will be some -- as we  
8 mentioned last week, there's a former TCEQ investigator that was  
9 more than hundred miles away -- so his deposition has to be  
10:56:42 10 used -- who is going to talk about essentially lack of resources  
11 at TCEQ to deal with this. He's also going to testify about how  
12 fines -- TCEQ fines do not affect Exxon's behavior.

13 THE COURT: Are those video or are those written  
14 depositions? Video --

10:56:59 15 MR. NICHOLAS: Video.

16 THE COURT: -- depositions?

17 MR. NICHOLAS: Video.

18 THE COURT: Well, that helps.

19 MR. NICHOLAS: We'll be able to play the video. We'll  
10:57:05 20 be able to play the video. So there's that testimony, and he's  
21 also going to testify about a specific order that --

22 THE COURT: Has he refused to come? Have you asked  
23 him to come?

24 MR. NICHOLAS: I have never been able to actually -- I  
10:57:17 25 have never reached him on the telephone when I've called him,

1 so I --

2 THE COURT: Well, maybe I'll reach him if you have to.  
3 Just ask him if he'll come but --

4 MR. NICHOLAS: I have not asked him.

10:57:27 5 THE COURT: No, but if you have any problem contacting  
6 anybody, you let me know --

7 MR. NICHOLAS: Well, I -- we assume --

8 THE COURT: Because I have ways to contact them. I  
9 may not have the authority to bring him in.

10:57:37 10 MR. NICHOLAS: I have his phone number. Both sides  
11 agreed that we would put in the video.

12 THE COURT: All right. Go on.

13 MR. NICHOLAS: At this point I think it's probably the  
14 easiest way to deal with it.

10:57:48 15 All right. Now these recordables -- so the  
16 recordables that I mentioned, the events that don't rise to the  
17 level of being put onto the TCEQ website, are compiled in lists,  
18 maintained on site and --

19 THE COURT: What is this I'm looking at?

10:58:07 20 MR. NICHOLAS: So we have compiled -- this is  
21 another -- this is Exhibit 1B, Plaintiffs' Exhibit 1B.

22 THE COURT: Non-reportable emission events, right?

23 MR. NICHOLAS: Right. So these are non-reportable  
24 emission events at the refinery for Count 1. So Exhibit 1 is  
10:58:29 25 linked to Count 1, and there's a 1A and a 1B.

1 THE COURT: These are not reportable. Who prepared  
2 this?

3 MR. NICHOLAS: These are based on Exxon's -- so these  
4 are Exxon's own records. And then these are the actual -- this  
10:58:42 5 is just a copy of the reportable.

6 Is that right?

7 This is an actual copy of Exxon's own records.  
8 The first one was the spreadsheet that Exxon and the Plaintiffs  
9 agreed on because they're reportable. We took them from the  
10:58:54 10 website.

11 THE COURT: Well, let me ask you this: What's your  
12 theory -- why does Exxon go to the self-reporting, self-damage  
13 report if, indeed, they don't have to?

14 MR. NICHOLAS: They have to.

10:59:09 15 THE COURT: They have to under what regulation,  
16 federal?

17 MR. NICHOLAS: State, state.

18 THE COURT: State. So even when it's non-reportable,  
19 they have to report them internally --

10:59:19 20 MR. NICHOLAS: Right. Yes.

21 THE COURT: Or do they have to send them to the  
22 agency?

23 MR. NICHOLAS: They keep them on site.

24 THE COURT: They keep them on site. They don't have  
10:59:27 25 to turn them in?



1 MR. NICHOLAS: Correct. The agency can look at them  
2 any time they want. They actually refer to the -- report  
3 complies with 30 TAC 101.201. Do you see that?

4 THE COURT: Where are you reading?

10:59:39 5 MR. NICHOLAS: On the very bottom. I can point on the  
6 ELMO.

7 THE COURT: Okay. I see it.

8 MR. NICHOLAS: So that is -- I'm pretty sure, should  
9 be -- that is the regulation that says if it doesn't rise, if  
10:59:53 10 there's no -- if there's not a reportable quantity at issue, if  
11 it doesn't rise to the level of being put onto the TCEQ website,  
12 then these are maintained on site.

13 THE COURT: All right. Now, what are we looking at  
14 here? The numbers are small, but what are they?

11:00:08 15 MR. NICHOLAS: Same information on Table 1A,  
16 essentially, the same information that goes onto the website but  
17 just it doesn't go on the website.

18 THE COURT: In other words, it says one and  
19 three-quarter pounds, another one, one hundredth of a pound.

11:00:20 20 MR. NICHOLAS: Right.

21 THE COURT: It goes down to .25 pounds.

22 MR. NICHOLAS: Right.

23 THE COURT: That's a quarter of a pound.

24 MR. NICHOLAS: Exactly. Yeah. And they're not always  
11:00:31 25 that small. Some of them are very large. I believe we'll

1 hear -- probably hear testimony about one that's 20,000 pounds.

2 THE COURT: 20,000 pounds not reportable?

3 MR. NICHOLAS: Right. I mean, we're not -- we're  
4 not -- we're taking them --

11:00:46 5 THE COURT: So what would the state agency come -- are  
6 they -- they have access to these? They're supposed to look at  
7 these once in awhile when they come out to inspect the plant?  
8 Yes, are they supposed to?

9 MR. NICHOLAS: They're supposed to. Well, they don't  
11:01:00 10 always -- yeah, they should. They don't always go out and  
11 inspect it.

12 THE COURT: If they're out there inspecting it -- I  
13 understand a pound and a half or whatever; but if they come  
14 across a 20,000-pound -- you know, 20,000-pound emission that's  
11:01:16 15 not reportable, wouldn't that ring a bell of some sort?

16 MR. NICHOLAS: It should, but it's --

17 THE COURT: Again, we're not hearing the other side.  
18 It rings a bell.

19 MR. NICHOLAS: It should --

11:01:23 20 THE COURT: It got my attention.

21 MR. NICHOLAS: And, in fact, I believe you'll hear  
22 from the clips that we'll play here from the former TCEQ  
23 enforcement person, TCEQ used to consider these when they came  
24 up with penalty enforcement orders. They used to consider these  
11:01:39 25 so-called recordables, but then TCEQ adopted a policy of not

1 considering them. So we view it as a failure.

2 THE COURT: Go on.

3 MR. NICHOLAS: Then there is -- all right. So Count 2  
4 of the complaint.

11:01:52 5 THE COURT: We're on Count 2?

6 MR. NICHOLAS: We're on Count 2 which is violations of  
7 hourly emission limits.

8 THE COURT: All right.

9 MR. NICHOLAS: So they could be anything. They could  
11:02:02 10 be a thousand pounds an hour. They could be 5,000 pounds an  
11 hour. It depends on what the pollutant is.

12 THE COURT: What are the -- are there hourly limits  
13 that are not violations or all of them are violations?

14 MR. NICHOLAS: If they're under the -- if they're  
11:02:16 15 under the limit, they would not be a violation. So if there's a  
16 1,000 -- as an example, if there's a 1,000-pound per hour carbon  
17 monoxide emission limit and -- at the chemical plant and they  
18 emit 500 pounds per hour, that wouldn't be a violation  
19 necessarily.

11:02:37 20 So for each of the plants, we have come up with  
21 an agreement with Exxon, a set of stipulated tables that reflect  
22 emission events, both STEERS and recordable, that show  
23 violations of the hourly emission limits. These are Plaintiffs'  
24 Exhibits 2A through 2F, and these are -- these are the same kind  
11:03:07 25 of records -- the stipulations will look the same as the ones we

1 just went over.

2 But here's an example for the olefins plant. So  
3 it would be on the top summary, emission limits -- limit  
4 violations from the olefins plant. So this would be 2C, same  
5 sort of information, tracking number, Bates number, date and  
6 time, start date and time, end date and time, duration, all of  
7 the same columns.

8 And here again there's a column for reported  
9 emission limit. So here's an example of -- you'll see some  
10 zeros. You'll see some non-zeros. All of this information  
11 is -- so here you'll see 780 pounds per hour, reported emission  
12 amount released 12,000 pounds. So that is -- these are  
13 reflected in Exhibits 2A through 2F. The reason that they're  
14 broken up -- they're broken up by plant, and they're broken up  
15 by reportables and recordables.

16 So there's six tables for that. Then Table -- or  
17 Count 3 are violations of highly reactive VO -- volatile organic  
18 compounds rule. There's a special rule in Texas that caps  
19 emissions of HR VOCs which are particularly ozone-forming  
20 chemicals. They're particularly susceptible to the formation of  
21 ozone. And there's a 1200-pound per hour limit on that, and  
22 that's reflected in Exhibit 3. And so that's self -- this is --

23 THE COURT: Exhibit 3 or Count 3?

24 MR. NICHOLAS: Exhibit 3, Count 3, we've linked up the  
25 numbers. Count 4 is violations of the smoking flare

1 prohibition. So what --

2 THE COURT: Smoking flare?

3 MR. NICHOLAS: Right. Flares can't smoke for more  
4 than five minutes in any two-hour time period.

11:05:37 5 THE COURT: What is smoking flare?

6 MR. NICHOLAS: Literally smoking. The flares that  
7 have the flames coming out of them can't smoke. They can't emit  
8 smoke.

9 THE COURT: That can't emit smoke, not the flame,  
11:05:47 10 smoke?

11 MR. NICHOLAS: Right. Because the smoke is  
12 essentially particulate matter and billows all over the place.  
13 So there's a limit on how much -- on how much a flare can smoke.  
14 It's five minutes in two hours. So the records reflect when --  
11:06:05 15 when the flare smoked for more than five minutes in two hours.  
16 And it will be described in, perhaps, deviation reports or  
17 STEERS reports; but essentially, these reports will reflect and  
18 will literally say it smoked for more than five minutes. That's  
19 Count 4.

11:06:26 20 Count 5 is the permits prohibit flares from --  
21 pilot flames that flares have to be operating at all times  
22 because if pollution goes into a flare, it's supposed to -- the  
23 flare is supposed to burn it. That's what's supposed to happen.  
24 If the pilot flame is out, the pollution just goes right out.

11:06:50 25 THE COURT: Where is the pilot flame, up top or in the

1 bottom?

2 MR. NICHOLAS: Top.

3 THE COURT: So that's what we call the pilot flame?

4 MR. NICHOLAS: Correct.

11:06:57 5 THE COURT: Not like on an oven where it's somewhere  
6 else? In other words, it's -- so is a pilot --

7 MR. NICHOLAS: It's --

8 THE COURT: When you say "pilot flame," is that the  
9 main flame we see flaring at the refineries?

11:07:08 10 MR. NICHOLAS: No. It's a flame that when the gasses  
11 go through the pilot flame they will combust and create the  
12 flame --

13 THE COURT: Got it.

14 MR. NICHOLAS: -- that you see.

11:07:17 15 So Count -- Plaintiffs' Exhibit 5 is a listing of  
16 all of the times that Exxon has self-reported that the pilot  
17 flame at the flare went out. That's Count 5, Plaintiffs'  
18 Exhibit 5. Again, those are stipulated.

19 Count 6 is a prohibition on fugitive emissions.  
11:07:42 20 Fugitive emissions are emissions that are not vented through,  
21 basically, a stack of some sort. They're loose. They're rogue.

22 THE COURT: What do they do with them? I mean --

23 MR. NICHOLAS: They go out -- they just go out in the  
24 atmosphere.

11:07:55 25 THE COURT: Go out of where?

1 MR. NICHOLAS: They go out of leaks. They go out of  
2 unvented spots and equipment. They just -- they're not rooted  
3 to a particular emission point.

4 THE COURT: All right.

11:08:06

5 MR. NICHOLAS: So, again, the -- Exxon's own records  
6 will report when something is a fugitive emission leak both in  
7 the deviation reports and the STEERS reports. These columns  
8 will reflect that, and they are also -- the EPN, the emission  
9 point number, will often have something like a -- or an FUG on

11:08:33

10 it, which means fugitive. So, took those, put them into a  
11 table; and that's Count 6 and Exhibit 6.

12 Count 7 are all of the violations reported in  
13 twice yearly deviation reports. These are the reports.

14 THE COURT: This is, what, summaries or not?

11:08:56

15 MR. NICHOLAS: Well, the deviation reports are  
16 literally lists of violation. And so they will have a variety  
17 of information on them.

18 THE COURT: What's the differences between this and  
19 the other charts we've seen?

11:09:08

20 MR. NICHOLAS: Well, they over --

21 THE COURT: They overlap?

22 MR. NICHOLAS: They overlap to some degree. But the  
23 deviation reports also include recordkeeping, monitoring  
24 problems, failure to test equipment properly. So, there will be  
25 that kind of a violation in addition to direct emissions into

11:09:21

1 the air.

2 So, we have created 7A through 7E with Exxon.

3 Those are stipulated tables. So, 7A -- so, we have

4 cross-referenced. If there's a STEERS event, that would mean

11:09:52 5 it's an overlapping on one of the other charts that's identified  
6 here.

7 Again, we've always -- we always have an

8 underlying document referred to, Bates number. And as a permit

9 condition that's being violated, that's this column. If there's

11:10:09 10 a pollutant that's coming out, that's identified here. It's not  
11 always the case, but here it's hydrogen sulfide.

12 The regulatory requirement that's being violated,

13 that's in this column. Type of requirement, that's in this

14 column. The start and end date, again, the reported cause of

11:10:27 15 the deviation is spelled out in these reports. Corrective  
16 action that's been taken and the number of deviations is also  
17 listed.

18 And so, we do that for each of the plants. All

19 the deviation reports, underlying deviation reports, are in the

11:10:51 20 record. And so, these are -- Plaintiffs' Exhibits 1 through 7E  
21 are again a stipulated -- stipulated versions, summaries of all  
22 of the underlying records that prove the violations.

23 THE COURT: All right.

24 MR. NICHOLAS: Thank you.

11:11:15 25 THE COURT: I'm not going to -- you've used about



1 almost -- just almost exactly an hour, 59 minutes.

2           What we're going to do -- I'm going to give you  
3 about -- since we take a break every hour and a half for about  
4 ten minutes or so -- okay, so I stick to that so everybody can  
11:11:29 5 take a break -- I'll let you know in about 20 -- 20 minutes.  
6 We'll take a ten-minute break, and then we'll continue to pick  
7 up.

8           You're under no time constraints either. All  
9 right, Defense. Mr. Nichols.

11:11:43 10           MR. NICHOLS: Good morning and thank you, your Honor,  
11 for giving us the time to provide a little bit more of an  
12 overview of the case other than what we did on Friday.

13           THE COURT: Your time.

14           MR. NICHOLS: And with respect to the time that the  
11:11:52 15 Court has given us on opening, I would just like to lay out a  
16 big picture overlay, a road map, of where this case is going  
17 from our perspective.

18           Now, with respect to the matters that are at  
19 issue in this case, you've heard this is a citizen suit brought  
11:12:10 20 by two environmental advocacy programs. And, your Honor, could  
21 we just get the slides up.

22           THE COURT: All right. It's now -- I have 11:14.  
23 We'll be back in at 11:25. All right? We'll see you in about  
24 ten minutes, and we'll keep on going.

11:13:25 25           (Court recessed at 11:12 a.m.)

1 (Court resumed at 11:26 a.m.)

2 THE COURT: All right. Go right ahead, sir.

3 MR. NICHOLS: Good morning, your Honor. What I was  
4 saying before the break is we want to provide an overview of  
11:25:49 5 where we think the case is headed from our perspective.

6 As your Honor remarked on Friday, we are not here  
7 to judge what the two Plaintiff organizations need to do to have  
8 their case survive a motion to dismiss. We are not here to  
9 decide what the Plaintiffs' organizations need to do to survive  
11:26:14 10 a motion for summary judgment. We're here for trial.

11 And, your Honor, with respect to the trial of any  
12 lawsuit, there are certain standards of proof that the person  
13 with the burden of proof must meet before they come to this  
14 Court seeking any form of relief. There's been a lot of  
11:26:40 15 discussion about the various cases that apply in Clean Air Act  
16 cases.

17 Judge, I'll tell you right now, you're not going  
18 to find a whole lot of cases on the sufficiency of evidence at a  
19 trial on a Clean Air Act case.

11:26:50 20 THE COURT: What about that East Texas case he was  
21 referring to?

22 MR. NICHOLS: That East Texas case he's referring to  
23 refers to a burden of proof on our affirmative defense for the  
24 act of God for Hurricane Ike.

11:27:02 25 THE COURT: Where is that, out of which? Was it out

1 of Beaumont?

2 MR. NICHOLS: I believe -- I need to check their site,  
3 but I believe it was out of the Eastern District. I don't --  
4 can't remember if it was Beaumont or not; but in any event, that  
11:27:14 5 relates to the discussion we had last Friday about the Hurricane  
6 Ike events. And that is a matter in which we bear the burden of  
7 proof.

8 And, your Honor, we're going to meet that. And  
9 so as a result of that, we're going to ask you to be dismissing,  
11:27:28 10 entering a directed verdict, entering a final judgment on  
11 those -- on those claims because they are subject to the act of  
12 God defense but more broadly --

13 (Discussion off the record.)

14 MR. NICHOLS: So, your Honor, as we discussed, we're  
11:29:37 15 here -- two groups, Environment Texas Citizen Lobby and Sierra  
16 Club are bringing this lawsuit. Now, no matter what the agenda,  
17 no matter what the goal, no matter what the rhetoric is of  
18 environmental groups like this, your Honor, it is undisputed in  
19 the case that these groups in and of themselves do not have the  
11:29:59 20 right to bring a citizen suit. The only way they get a right to  
21 come to federal court is if there are members of these groups  
22 that can demonstrate the type of injury that is required to  
23 bring a citizen suit.

24 THE COURT: All right. So that's where we're here to  
11:30:21 25 see the factual basis, correct?

1 MR. NICHOLS: Exactly, Judge. And what you heard from  
2 Mr. Nicholas was we have the same remedy that the EPA has. We  
3 have the same remedy that TCEQ has. Your Honor, that could  
4 be -- there could be not a statement made in this case that is  
5 further from the truth than that. The remedy that is provided  
6 under the citizen suit provision of federal law is by its very  
7 nature, as we're going to go through here, a limited remedy.

11:30:40

8 Now, your Honor, you also heard that there are  
9 three Defendants in the case. You got ExxonMobil Corporation  
10 and two wholly-owned subsidiaries, the ExxonMobil Chemical  
11 Company which runs the chemical plants involved in the case and  
12 also ExxonMobil Refining and Supply Company that runs the  
13 refinery.

11:30:58

14 Next slide, please.

15 So, your Honor, you're going to be hearing a lot  
16 about the ExxonMobil Baytown Complex; and this is a large,  
17 industrial complex located on the Ship Channel in the Baytown  
18 area. You're going to hear evidence of -- just to orient the  
19 Court, that line that I'm doing the pointer on, that's I-10.

11:31:14

20 Then you've got a spur that runs off I-10 down towards the  
21 Baytown Complex.

11:31:36

22 THE COURT: Now, I-10. Where is Beaumont? Which way  
23 is --

24 MR. NICHOLS: Beaumont is down in this direction.

25 THE COURT: Okay. And downtown is to the left?

11:31:45

1 MR. NICHOLS: Yes, sir. And then this is a spur, 330,  
2 that you're going to hear about that runs from I-10 down towards  
3 the plant.

11:31:56

4 THE COURT: Where is the Gulf Freeway? Doesn't  
5 that --

11:32:08

6 MR. NICHOLS: No. It's going to be back over here in  
7 this direction, your Honor. So here is the Ship Channel right  
8 here in this area. And you're going to see additional photos.  
9 Remember I told you you're going to get a virtual tour of the  
10 plant. Down here are the docks where the facility takes in the  
11 raw product, in other words, where it takes in the crude; and  
12 then you're going to hear --

13 THE COURT: The crude comes in by ship, not by  
14 pipeline?

11:32:19

15 MR. NICHOLS: That's exactly right, Judge. So it  
16 comes by -- on these docks here, and it's going to be processed  
17 through this plant. You're going to hear about the three  
18 constituent parts of the plant.

11:32:29

19 THE COURT: Now, what comes out of this plant, what  
20 product?

11:32:45

21 MR. NICHOLS: So, in the refinery you've got refined  
22 petrochemical products. So everything from jet fuel, gasoline  
23 lube oils, you name it. Then you've got a chemical plant that  
24 produces, basically, feed stock chemicals that are used in  
25 other -- other types of facilities to produce various chemicals,

1 household chemicals and other things that people use every day.  
2 And then you have the -- you have -- at the top you have an  
3 olefins plant, which -- which produces other chemical-type  
4 products that are used in everyday application, including  
5 precursors, such things as polyethylene that we use in all --

11:33:07

6 THE COURT: Plastics, things like that?

7 MR. NICHOLS: In plastics, yes, sir. So, we're going  
8 to spend a great deal of time -- and I agree with Mr. Nicholas  
9 on this. We are going to look at the nuts and bolts of this  
10 plant because, as I told the Court on Friday, the Plaintiffs  
11 under their gotcha theory, under their scattershot approach are  
12 operating at a level of abstraction that completely ignores what  
13 the many good, hard-working men and women of ExxonMobil are  
14 doing out there at the Baytown Complex.

11:33:23

15 Next slide, please.

11:33:43

16 THE COURT: But that -- I also understand that you  
17 feel there's some sort of a standing problem. They're going to  
18 have to prove as a matter of fact that, in effect, it's not the  
19 organizations but actual individuals within those organizations  
20 that, in effect, have been damaged somehow to give them standing  
21 at all.

11:33:56

22 MR. NICHOLS: Yes, sir. And so what -- the difference  
23 between -- if I can crystallize it, the difference between the  
24 Plaintiffs' approach and the approach that you're going to see  
25 us do as if we were the Plaintiffs, as if we were prosecuting a

11:34:11

1 citizens suit ourselves, we're actually going to be presenting  
2 from our standpoint, if you really wanted to touch all the bases  
3 of a citizen suit claim, if you really want to do it, they could  
4 do it.

11:34:36 5                   They could have tried to meet those bases; but  
6 we're going to show in this case that they haven't done it,  
7 including by virtue of standing. So, your Honor, with respect  
8 to the men and women who are working out there everyday --

9                   Next slide.

11:34:50 10                   -- we're here to represent, defend these clients  
11 against a limited remedy that's provided to citizens under the  
12 Clean Air Act. And this is the statute itself, Judge.

13                   THE COURT: Now, it says, provided subsection, "Any  
14 person may commence a civil action on his own behalf."

11:35:13 15                   MR. NICHOLS: Yes, sir.

16                   THE COURT: And you're saying that's not the case  
17 here.

18                   MR. NICHOLS: This is the statute. This is the --

19                   THE COURT: No, I know. But you're saying this is not  
11:35:19 20 the case with the Plaintiffs in this case?

21                   MR. NICHOLS: That's correct. Because they can't  
22 meet -- they can't run all the bases that you have to run to  
23 proceed with a citizen suit case. And we've highlighted --  
24 remember the statement that Mr. Nicholas said --

11:35:31 25                   THE COURT: Let me read the whole thing first.

1 MR. NICHOLS: Yes, sir.

2 THE COURT: Okay, got it.

3 MR. NICHOLS: So where the difference is -- one of the  
4 key differences is, first of all, they have to show -- it's the  
11:36:14 5 Plaintiffs' burden to show a violation. It's not just any old  
6 violation, as we talked about on Friday, your Honor, that allows  
7 a citizen to bring a citizen suit.

8 The Congress specifically said that for  
9 wholly-past violations, in other words, things that occurred in  
11:36:32 10 the past, you had an emissions event in the past, you can't go  
11 get to that under this statute. You have to show evidence that  
12 the alleged violation had been repeated, and that's going to be  
13 another key element in addition to standing, your Honor, that is  
14 going to be at issue in this case.

11:36:50 15 What does it mean? What is the Plaintiffs'  
16 burden to show that a violation has been repeated?

17 THE COURT: What's the case law? Case law goes both  
18 ways or there's not much case law?

19 MR. NICHOLS: We think the case law indicates that you  
11:37:04 20 cannot do what Mr. Nicholas told you this morning they intend to  
21 do, which is to say that every time the facility had a carbon  
22 monoxide release, that that's a repeat event.

23 MR. NICHOLAS: Objection, your Honor. Your Honor has  
24 already ruled on that.

11:37:18 25 MR. NICHOLS: That's -- that's -- you already ruled



1 against it.

2 THE COURT: How did I rule on it? Put it in the  
3 record, and then I want Mr. Nichols to meet it.

4 MR. NICHOLAS: Yes. The ruling was in the  
11:37:30 5 memorandum -- okay.

6 MR. NICHOLS: Your Honor, may I proceed?

7 THE COURT: No, no. But I'm going to put him on the  
8 clock. This is a better way to do it.

9 Go on.

11:37:45 10 MR. NICHOLAS: Document 126, Memorandum and  
11 Recommendation on Exxon's Motion for Summary Judgment; and I  
12 specifically refer to pages --

13 THE COURT: Just tell me about it.

14 MR. NICHOLAS: Yeah. This Court has already ruled  
11:38:00 15 that when an emissions standard in a permit, say, pounds per  
16 hour for carbon monoxide, if it's repeated, if it's been  
17 violated more than once, that's the way to establish the  
18 violation. That's one way to do it. So, the other way to do  
19 it, an alternative, an addition not required is to show that  
11:38:24 20 there are a variety of different types of violations all caused  
21 by the same underlying cause.

22 THE COURT: All right. Got it.

23 MR. NICHOLAS: Two separate concepts.

24 THE COURT: It is a theory. Talk about it.

11:38:35 25 MR. NICHOLS: Yes, sir.

1 THE COURT: The easiest way -- and this is a non-jury  
2 case. That's why I will go around -- I did that on Friday. I  
3 stopped, and I get a short verse. That way you can deal with it  
4 while it's fresh in my mind instead of waiting until later.

11:38:47 5 MR. NICHOLS: Yes, sir.

6 THE COURT: Go right ahead.

7 MR. NICHOLS: The Court has made no ruling as to what  
8 evidence these Plaintiffs have to show to prevail.

9 THE COURT: What is Mr. Nicholas referring to?

11:38:56 10 MR. NICHOLS: He's referring to a statement about the  
11 fact that under their current set of allegations, they could  
12 bring certain allegations to trial. We're here to try the  
13 lawsuit, and the Court said in that same memorandum that this  
14 Court is not saying that the Plaintiffs have met or will meet  
11:39:12 15 their burden of proof at trial.

16 With respect to the statute, your Honor, it's  
17 their burden to show that the alleged violation has been  
18 repeated.

19 THE COURT: All right. So there's the key, there's  
11:39:22 20 the word that got them up. Now I understand it, as far as the  
21 theory goes. So, go on.

22 MR. NICHOLS: There is an alternative, but not the one  
23 that Mr. Nichols mentioned, which is that you can bring a suit  
24 if -- or to be in violation of. And what that means, what the  
11:39:38 25 cases have said, your Honor, is that means an ongoing violation.

1 In other words, you can go one of two ways. If the events that  
2 you're talking about occurred in the past -- and, believe me,  
3 with respect to all that volume of paper that Mr. Nicholas told  
4 you about --

11:39:56 5 THE COURT: A lot of paper is your own.

6 MR. NICHOLS: Exactly, but we're dealing with  
7 wholly-past violations. So they're going -- it's their burden  
8 to show repeated.

9 MR. NICHOLAS: Objection.

11:40:06 10 THE COURT: Overruled. That's enough.

11 Now, keep going.

12 MR. NICHOLS: And with respect to ongoing, that is  
13 their burden to show that there are ongoing violations, and we  
14 contend the evidence will show --

11:40:19 15 THE COURT: So, you're saying each one of those  
16 events, none of them ever been repeated?

17 MR. NICHOLS: Not -- not in the way that the -- that  
18 the statute contemplates if you want to bring a Clean Air Act  
19 citizen suit.

11:40:33 20 Judge, you have heard me say from the get-go in  
21 this case that -- I have asked repeatedly, we've asked in our  
22 pleadings, we've asked in our motions -- focus your case on  
23 those matters where you truly believe that incidents have been  
24 repeated. You heard me on Friday say -- when Mr. Kratka got up  
11:40:55 25 and said "We want to put in evidence of things that happened

1 after the cutoff date," you heard my response.

2 I will withdraw my objection if they're prepared  
3 to prove that that -- those post cut-off events are repeated of  
4 something that happened before. And you heard Mr. Kratka say,  
5 "No, no, that's not the point. That's not what we're doing."  
6 That's not the point, Judge.

11:41:12

7 THE COURT: I understand the legal point, okay? And  
8 I'm going to do it as a matter of law eventually if the legal  
9 matter is controlling, but then again if we don't reach to that  
10 point or it's not true, then this is ongoing and a lot of  
11 pollution, apparently, going into the air. What could be done  
12 to stop it?

11:41:26

13 MR. NICHOLS: But it's got to be --

14 THE COURT: I know. It's got be repeated, according  
15 to you, correct?

11:41:38

16 MR. NICHOLS: Or it can be ongoing. But it's got to  
17 be ongoing in the way that the statute contemplates, which is,  
18 for example, if as of today, we had an ongoing release at the  
19 facility, that would be ongoing. The cases talk about events  
20 that may be capable of repetition, but you've got to show the  
21 specifics. And that's where the Plaintiffs --

11:41:55

22 THE COURT: No, sir. You're going to -- that's what  
23 we have -- that's what we have opening statements for, what they  
24 anticipate the evidence will show. I never lose sight of that  
25 fact. Okay. So you're all right. We're going to hear all your

11:42:12

1 evidence.

2 Go right ahead.

3 MR. NICHOLS: So, it's their burden to show ongoing  
4 violations. We don't believe they're going to get there.

11:42:23 5 Now, with respect to the other element, it's got  
6 to be -- either way you go, if it's a repeated violation or an  
7 ongoing violation, you've got to show that that's a violation of  
8 an emission standard or limitation under this chapter. Okay.

9 The last part, your Honor, I'll respectfully  
11:42:40 10 suggest to you, is not even going to come into play. In other  
11 words --

12 THE COURT: Or an issue or an --

13 MR. NICHOLS: Order.

14 THE COURT: -- order issued by the administrator or a  
11:42:48 15 state with respect to such a standard or limitation.

16 MR. NICHOLS: So, for example, if there was a consent  
17 decree or a court order or an administrative order that was out  
18 there, then the Plaintiffs could go there; but they're not  
19 claiming --

11:43:01 20 THE COURT: Is it your position that there's no, in  
21 effect, control specific enough to control this case?

22 MR. NICHOLS: There are -- there are -- no, that's not  
23 our position. Our position is this. Exxon scrupulously reports  
24 and records everything that goes on at that plant. The fact  
11:43:22 25 that you are going to hear about so many records in the case

1 should tell you, contrary to what Mr. Nicholas said, about this  
2 not being a shoddy operation.

3 THE COURT: You're saying all of that is not repeat  
4 offenses, they're all brand new?

11:43:37 5 MR. NICHOLS: They may not be repeat issues, they may  
6 not even be violations, Judge, because for the reasons we'll  
7 discuss at trial, just because you have made one of these  
8 reports, does not mean that it is a violation in the way that  
9 the Plaintiffs have characterized. But you have to show the  
11:43:56 10 emission standard or limitation that is being violated.

11 Next slide.

12 THE COURT: Hold on a second. Go back to the prior  
13 slide. I didn't understand that last phrase of yours.

14 MR. NICHOLS: So, you can go two ways, if you want to  
11:44:12 15 show a repeated violation or an ongoing violation. Of what? It  
16 can either be an emission standard or limitation or an order  
17 issued by the administrator or estate. That second part, your  
18 Honor, is not going to come into play in this case. In other  
19 words, no one is alleging --

11:44:30 20 THE COURT: All right. I didn't understand your  
21 phraseology concerning where it's subsection capital "A."

22 MR. NICHOLS: Sure.

23 THE COURT: "An emission standard or limitation under  
24 this chapter." You're saying it's not found in the chapter or  
11:44:41 25 it's what?

1 MR. NICHOLS: No, no. The statute itself -- and we'll  
2 get there -- actually defines what an emission standard or  
3 limitation is, and it will include various elements.

4 If we can go to the next slide.

11:44:52 5 THE COURT: But it's not within that limitation?

6 MR. NICHOLS: No, no, no.

7 Let's go back to that slide.

8 THE COURT: Please. This is the advantage of a  
9 non-jury trial.

11:45:05 10 MR. NICHOLS: So an emission standard or limitation is  
11 a defined term under this very provision, 7604 of Title 42. In  
12 other words, it sets out what an emission standard or limitation  
13 is and is not.

14 THE COURT: Okay. As it applies to this case, what's  
11:45:20 15 your position?

16 MR. NICHOLS: Our position is that with respect to the  
17 various things that the Plaintiffs will claim are emission  
18 standard or limitations that they're not.

19 THE COURT: Okay, got it. Next.

11:45:31 20 MR. NICHOLS: Next slide.

21 So, standing. We've discussed that. I think the  
22 Court has a very good idea of where we're going on that.

23 Next, you have to show an actual violation of the  
24 Clean Air Act.

11:45:42 25 THE COURT: Now, Article 3 requirement. Article 3 of

1 what?

2 MR. NICHOLS: Article 3 of the United States  
3 Constitution.

4 THE COURT: That's what I thought. Go on.

11:45:48 5 MR. NICHOLS: And so -- and as you know, Judge, you  
6 can't even walk into the federal court successfully especially  
7 at a trial of the case unless you can show your standing. And  
8 as the cases -- legion cases have said, if you fail on standing,  
9 that's where you stop.

11:46:05 10 THE COURT: Isn't that jurisdiction?

11 MR. NICHOLS: It is jurisdiction.

12 THE COURT: All right. Jurisdiction can be raised any  
13 time?

14 MR. NICHOLS: Yes, sir.

11:46:11 15 THE COURT: Go on.

16 MR. NICHOLS: So, second, even if you get past first  
17 base on standing for recovery on the merits, then you go to --  
18 you try to get to second base, an actual violation of the Clean  
19 Air Act.

11:46:23 20 Next.

21 THE COURT: Federal Clean Air Act?

22 MR. NICHOLS: Yes, sir.

23 THE COURT: Go on.

24 MR. NICHOLS: That Title 42. As we discussed, a  
11:46:28 25 repeated or ongoing violation of a specific emission standard or



1 limitation.

2 And then, finally, if you circle all those bases,  
3 then it is also the Plaintiffs' burden to show an appropriate  
4 remedy.

11:46:43 5 THE COURT: Now, I assume that you will without  
6 prejudice discuss that last point --

7 MR. NICHOLS: We will.

8 THE COURT: -- somewhere in your case and/or in your  
9 summation.

11:46:54 10 MR. NICHOLS: We will.

11 THE COURT: In other words, notwithstanding you say  
12 you have them prove one, two, or three, if they have, then I'm  
13 going to hear what your position is without waiving any of the  
14 other positions that you have, correct?

11:47:08 15 MR. NICHOLS: And you actually are going to hear about  
16 remedy in two places. If you recall when we went through, we  
17 tracked for you on Friday. We tracked the elements of what the  
18 standing are. And one of the elements for standing that these  
19 environmental groups can choose to try to invoke is through  
11:47:28 20 their members; and as part of that standing requirement, it is  
21 their burden to show that whatever they're asking for will  
22 remedy the violations that they're claiming to sue over.

23 So, in other words -- so, a remedy making the  
24 link between something they say could prevent these alleged  
11:47:48 25 violations is part of their standing requirement and it's also

1 their burden, even if they were to round these bases, to show an  
2 appropriate remedy.

3 And, your Honor, I'm not going to preview all the  
4 evidence for you; but I think at the end of the day, you are  
5 going to get to hear directly from people like Gary Robbins  
6 sitting right here. You're going to look him in the eye. He's  
7 going to tell you about what goes on at that facility, and you  
8 can ask him whatever questions you want.

9 And to preview what we will be closing with,  
10 Judge, is that whatever suggestions -- whatever helpful  
11 suggestions these Plaintiff groups want to make do not make a  
12 lot of sense.

13 Next slide.

14 So, with respect to the standing issue, Judge, if  
15 you'll recall, one of the key cases that Plaintiffs rely on is  
16 the Texans United versus Crown Central Petroleum case. It's a  
17 case out of the Fifth Circuit in 2000. And this case  
18 illustrates two things: Number one, it illustrates the  
19 difference between being on a motion to dismiss, a motion for  
20 summary judgment, and being at trial.

21 So, what the Fifth Circuit said was, "Moreover,  
22 we disagree with Crown's assertions" -- Crown was the Defendant  
23 -- "that Texans United" -- they were the citizen suit Plaintiff  
24 -- "must at this stage establish that Crown violated the CAA."

25 THE COURT: What's the stage? What's the --

1 MR. NICHOLS: It was a summary judgment case.

2 THE COURT: Summary judgment.

3 MR. NICHOLS: Judge Gilmore granted summary judgment.

4 The Fifth Circuit reversed her by saying at this point --

11:49:23 5 THE COURT: That's at this stage because also --

6 again, don't assume one thing or another -- jurisdiction even if  
7 it has some factual basis that needed to be proved can be raised  
8 at any time even on appeal. We all know that.

9 MR. NICHOLS: So the Fifth Circuit says --

11:49:41 10 THE COURT: Read it again. It's easy for me to follow  
11 you along.

12 MR. NICHOLS: So, it says, "We disagree with Crown's  
13 assertion that Texas United" --

14 THE COURT: Slow down, please. The court reporter  
11:49:48 15 needs to take it down. Go on.

16 MR. NICHOLS: "We disagree with Crown's assertion that  
17 Texans United must at this stage establish that Crown violated  
18 the CAA on the occasions that affiants suffered harm from the  
19 Crown emissions." See by the word "affiants," Judge, you know  
11:50:04 20 this is a summary judgment case, right, because they're dealing  
21 with affidavits. They're not dealing with the live testimony  
22 which is going to be their burden to put on.

23 "Although Texans United must ultimately establish  
24 causation if they are to prevail on the merits, they need not do  
11:50:19 25 so to establish standing at this stage." So what you got is a

1 situation where --

2 THE COURT: Well, let me --

3 MR. NICHOLS: -- the Fifth Circuit.

4 THE COURT: Hang on. Let me finish.

11:50:28 5 MR. NICHOLS: Yes, sir.

6 THE COURT: All right.

7 MR. NICHOLS: And the causation being discussed there  
8 is a causation of injury. It's not like some abstract thing  
9 like we talked about on Friday of the fact that when a butterfly  
10 flaps its wings in Japan it affects global climate conditions.

11:50:46 11 It's not a situation where the emissions -- permitted emissions  
12 at the Baytown facility, obviously, go into the atmosphere.

13 The causations link that it is Plaintiffs' burden  
14 to show at trial means that they need to show the Court: I've  
11:51:06 15 got a member. This member lives at a particular address. And  
16 at this particular address, this particular person was affected,  
17 injured by one of these events that we're trying to get remedies  
18 for under the citizen suit case.

19 And so as the Fifth Circuit says, they are going  
11:51:26 20 to have that burden at trial.

21 Next slide.

22 This, your Honor -- you asked about this earlier.  
23 This is a very long definition of what an emission standard or  
24 limitation is under the statute, but I'm respectfully suggesting  
11:51:43 25 -- if we go to the next slide.

1                   -- that they -- these are going to be the ones,  
2 the portions of that definition, that is, the definition of  
3 emission standard or limitation, that will be at issue in this  
4 case.

11:51:55 5                   THE COURT: All right. Well, what -- who has to prove  
6 what?

7                   MR. NICHOLS: So the Plaintiffs are going to have to  
8 show -- to establish a violation, they're going to have to show  
9 one of these three things that are implicated under the  
11:52:10 10 definition of -- of the statute. So you've got requirements  
11 under Section 7411 or 7412 of the title which may come into  
12 effect.

13                   THE COURT: What's that?

14                   MR. NICHOLS: That deals, your Honor, with certain  
11:52:21 15 types of emissions or certain types of opacity events and  
16 certain types of things that relate to the flaring issues.

17                   THE COURT: Hold it. Without regard to whether such  
18 requirement is expressed as an emission standard or otherwise.

19                   All right, go on.

11:52:38 20                   MR. NICHOLS: Then any other standard limitation or  
21 schedule established under any permit issued pursuant to  
22 Subchapter V of this chapter.

23                   THE COURT: Now, permit, Subchapter V, what -- who can  
24 issue permits?

11:52:50 25                   MR. NICHOLS: So, this overlaps what you heard from

1 Mr. Nicholas earlier today what's called the Title V permits.  
2 So when we're talking about Title V, you've got that statement  
3 there.

4 THE COURT: Who issues the Title V permits?

11:53:00 5 MR. NICHOLS: So, the Title V permits are going to be  
6 issued by the regulatory authorities, that is, the state  
7 authorities under the cooperative federalism that we have  
8 between EPA and TCEQ.

9 THE COURT: Got it.

11:53:12 10 MR. NICHOLS: And then, third, any other standard  
11 limitation or schedule established under any applicable state  
12 implementation plan approved by the administrator, any permit  
13 term or condition.

14 THE COURT: Stop a second. I want to read it again.

11:53:34 15 MR. NICHOLS: Yes, sir. And these were --

16 THE COURT: Administrator. Who is the administrator?  
17 Is that the administrator of the state agency?

18 MR. NICHOLS: No. That's the EPA.

19 THE COURT: Okay.

11:53:40 20 MR. NICHOLS: You're going to hear a lot about this  
21 term "State Implementation Plan." It goes by an acronym, SIP.  
22 And so the State Implementation Plan is a plan that TCEQ and the  
23 State of Texas is authorized to implement, in other words, the  
24 enforcement of the environmental laws in this country.

11:54:00 25 THE COURT: Who draws up the plan, the state and

1 submits it for federal approval?

2 MR. NICHOLS: Yes, sir.

3 THE COURT: But the state agency submits it to the  
4 feds for approval. If it's approved, they can go ahead.

11:54:10 5 MR. NICHOLS: And the State Implementation Plan is,  
6 quite frankly, what has led to the generation of all of these  
7 records. In other words, TCEQ says we are going to implement  
8 the Clean Air Act in the State of Texas under this State  
9 Implementation Plan.

11:54:27 10 THE COURT: All right. Right on that point, part of  
11 what we heard from the Plaintiffs' opening as to what they feel  
12 the evidence shows, shall we say that there were some  
13 shortcomings with the state agency? What's the defense position  
14 on that?

11:54:38 15 MR. NICHOLS: The defense position on that will be  
16 clear from a slide that I'm going to show you in just a minute,  
17 Judge.

18 THE COURT: Okay.

19 MR. NICHOLS: Let's go -- let's go -- so, first of  
11:54:46 20 all, on the issue of repeated violation, we believe the Court  
21 had asked, you know, what do you need to show to show repeated  
22 violation? We believe these are the things that the Plaintiffs  
23 have to show. It's their burden. These are wholly-past  
24 violations as we talked about.

11:55:04 25 Next.

1 And as the cases have said, repeated, it's the  
2 same violation occurring more than once.

3 THE COURT: What does that mean as far as you  
4 interpret the cases because there's a difference of opinion?

11:55:15

5 MR. NICHOLS: Yes. So, instead of dealing with the  
6 level of abstraction the Plaintiffs are dealing with, which is  
7 that -- as you heard from Mr. Nicholas, that any time you  
8 violate a carbon monoxide limit at the plant anywhere, anywhere  
9 across the expanse of a facility that runs, I believe, two and  
10 half miles wide at one place that has thousands of pieces of  
11 equipment, millions and millions of valves, millions of complex  
12 systems, that no matter where on that facility, where in that  
13 fence line perimeter a carbon monoxide emissions event occurs,  
14 that ipso facto it's repeating; and that is not the law.

11:56:01

15 THE COURT: All right.

16 MR. NICHOLS: Next.

17 So, in other words, Mr. Nicholas is right on one  
18 score. You need to show it's the same pollutant but that's not  
19 all.

11:56:14

20 Next.

21 You got to show it's the same limit. Remember,  
22 we talked about emission standard of limitations. So it's got  
23 to be the same, in this case, pound-per-hour limit. I think  
24 Mr. Nicholas just admitted for you they're not even raising any  
25 issues concerning annual limits.

11:56:30



1 Next.

2 Same emission point. In other words, you can't  
3 take --

4 THE COURT: Same tower?

11:56:38 5 MR. NICHOLS: Yes. You can't take one event that  
6 occurs on the east side of the facility, one emission plant over  
7 there and an issue with that, and then say if a carbon monoxide  
8 release occurs on the complete opposite side of the facility --

9 THE COURT: What if it's the same unit, a couple of  
11:56:53 10 days apart or a month apart?

11 MR. NICHOLS: Exactly, Judge.

12 Next bullet point.

13 Same emission source. So you've got the same  
14 emission source, that is, the same source of trouble that you  
11:57:06 15 have at the facility.

16 Next.

17 And to the Court's question, the same root cause.  
18 In other words, you're going to evidence in the case, Judge,  
19 that it's not only the law but it's also the regulatory  
11:57:21 20 framework that requires everyone, everyone that has a genuine  
21 interest in operating facilities, everyone who has a genuine  
22 interest in regulating facilities. You don't deal at the level  
23 of abstraction that the Plaintiffs' environmental groups are  
24 dealing with. You get to the root cause.

11:57:40 25 THE COURT: Well, have you gotten to the root cause of

1 these problems?

2 MR. NICHOLS: Yes, sir. And this man right here, Gary  
3 Robbins, is going to testify to it.

11:57:51

4 THE COURT: So, how come it keeps coming over and over  
5 and over?

6 MR. NICHOLS: Because, your Honor, the Plaintiffs have  
7 presented you with two things. They presented you with --

8 THE COURT: They pointed me with your records.

11:57:58

9 MR. NICHOLS: Yes, exactly. Records that show a lot  
10 of numbers, okay. They've presented that, and they've also  
11 presented the Court with what, in essence, is a false standard.  
12 The false standard they presented to the Court, which no one  
13 agrees with, you're going to hear -- you're --

11:58:15

14 THE COURT: Well, there's some folks that agree with  
15 it.

11:58:33

16 MR. NICHOLS: No. You're going to hear -- you're  
17 going to hear that the environmental regulators, the EPA, the  
18 TCEQ, everyone that's involved in the operation of these plants,  
19 understands that you are never -- so long as you have plants  
20 that run mechanical equipment and that are run by human beings,  
21 the idea that you are going to have an absolutely perfect record  
22 with each and every one of hundreds of thousands of permit  
23 conditions, that is a false standard.

11:58:52

24 THE COURT: Okay. Now, is that going to be the  
25 testimony of your experts?

1 MR. NICHOLS: Yes, sir.

2 THE COURT: Is that going to be the testimony of their  
3 experts?

4 MR. NICHOLS: I think it will.

11:58:58 5 THE COURT: Well, that's what cross examination is  
6 for.

7 MR. NICHOLS: I think it will.

8 THE COURT: All right, go on.

9 MR. NICHOLS: Next.

11:59:05 10 So this is the other prong, Judge, that we talked  
11 about, ongoing events. So, the case law says single completed  
12 violations are not ongoing or repeated.

13 THE COURT: Once again, I'm going to ask you this --  
14 and both sides eventually are going to have to back this up, I  
11:59:20 15 suppose. Is case law backing this up?

16 MR. NICHOLS: This comes out of case law.

17 THE COURT: And I assume it may be from both sides.  
18 But I'm just saying, you know, they -- I'm seeing where the  
19 issues are really being drawn.

11:59:33 20 Okay, go on.

21 MR. NICHOLS: Yes, sir.

22 Or as I said earlier, ongoing can be a likelihood  
23 of recurrence of same violation. So -- so, if you operate at  
24 Mr. Nicholas's level of abstraction, that is, is it likely that  
11:59:50 25 the ExxonMobil facility at some point in the future is going to

1 have a carbon monoxide release, the answer to that question is  
2 yes.

3 THE COURT: All right. You're anticipating my  
4 question.

12:00:05 5 MR. NICHOLS: That's not the standard. The standard  
6 is it's got to be a likelihood of recurrence of the same  
7 violation which again loops you back to the idea --

8 THE COURT: Of the definition.

9 MR. NICHOLS: -- of the definition and the idea that  
12:00:18 10 plants emit carbon monoxide. The purpose of this citizen suit  
11 provision is to -- as the cases have said, if a plant is out  
12 there and if it's operating and it has a continuous acting up  
13 source of trouble and the regulators don't do anything about it  
14 and the plant doesn't do anything about it, bring your citizen  
12:00:42 15 suit. Bring it on.

16 THE COURT: But you still have to show in the  
17 standing.

18 MR. NICHOLS: You've got to show --

19 THE COURT: You go back to the standing.

12:00:47 20 MR. NICHOLS: You've got to show standing, but, you  
21 know, that's something we can deal with. And that's what I've  
22 been saying all along in this case. If you have something that  
23 meets those criteria, if you want to talk about two events  
24 specifically, dig into the details, go into the files that are  
12:01:03 25 available on the publicly available websites.

1 THE COURT: Now, your position is that every time some  
2 smoke blows out of a stack, it's a separate violation.

3 MR. NICHOLS: It is a -- it can be a violation. If it  
4 is a violation, it is a separate violation; but I'm not  
5 suggesting that there cannot -- there's no way to prove in a  
6 citizen suit case that events are repeated.

7 The fact of the matter is, though, as the  
8 Plaintiff, you got to show it. You've got to take on that  
9 burden. You got to run those bases. And for them to come into  
10 court and just slap a bunch of Exxon's own reports together and  
11 say these are all repeated, it doesn't meet that burden.

12 Next.

13 Same inadequately corrected source of trouble.  
14 And this makes sense, Judge, because you don't want a situation  
15 where there's a facility that has a piece of equipment that is  
16 continuing to fail, a plant is not addressing that piece of  
17 equipment. That's where the Court steps in and says, "Hey, look  
18 guys, you've had chances to correct this thing. You haven't  
19 done it. Why haven't you done it?"

12:02:04 20 THE COURT: So what's your evidence going to show?  
21 That's what we haven't talked about, what your evidence is going  
22 to show.

23 MR. NICHOLS: The evidence is going to show that the  
24 events that we're talking about -- number one, there are about  
12:02:14 25 240 reportable events. Those are the events that are more

1 serious that deal with the reportable quantity of emissions that  
2 require the STEERS reporting that you've heard about. So, with  
3 respect to those, that there is an exhaustive root cause  
4 analysis that occurs with each and every one of those.

12:02:32 5 THE COURT: Have they corrected them?

6 MR. NICHOLS: They correct those issues.

7 THE COURT: How come they keep recurring with hundreds  
8 or thousands of pounds of pollutants in the air?

9 MR. NICHOLS: And that's -- again, that's the false  
12:02:46 10 premise that I believe the Plaintiffs are operating under.

11 THE COURT: That's their theory, which I haven't heard  
12 yet. I haven't heard yours yet either as far as evidence goes  
13 but --

14 MR. NICHOLS: Every time -- their theory is every time  
12:02:58 15 you have a reportable event, ipso facto, it's a recurring issue.  
16 We disagree with that, and we --

17 THE COURT: Well, how about corrective each time?

18 MR. NICHOLS: We are going to show the types of  
19 corrective actions that are taken with respect to the issues  
12:03:10 20 that arise. But that doesn't mean you're not going to have new  
21 issues that crop up.

22 THE COURT: Well, let me ask you this: Do your -- is  
23 your evidence going to show at least it's improving out there?

24 MR. NICHOLS: Absolutely. I'm going to get to a  
12:03:20 25 couple of slides, if I might, in just a minute. You're

1 previewing my presentation, Judge.

2 Any appropriate remedy. Again, this is the  
3 Plaintiffs' burden. Injunctive relief. And quite frankly, at  
4 the end of the day, we believe you're going to hear, as I said  
12:03:34 5 earlier, about some Plaintiffs' suggestions on how to run the  
6 complex which we believe make no sense whatsoever.

7 Penalties. Again, this is, again, part of  
8 Plaintiffs' gotcha theory. The reason, Judge, the reason, in my  
9 view, that the Plaintiffs do not want to focus on particular  
12:03:50 10 events is because they're all about the numbers. They're all  
11 about generating the biggest numbers, the 1.3 billion, the 600  
12 million, however you add them all up.

13 And the way they get there is not by looking at  
14 specific events and saying, "We have evidence that this is  
12:04:07 15 repeated," because that doesn't get them to the numbers they  
16 want to get to. So, instead, under this gotcha theory that  
17 they're putting before this Court at trial, they just want to  
18 throw it all up against the wall, see what sticks.

19 Next.

12:04:21 20 And the third part is that the regulators are on  
21 the job.

22 THE COURT: Which regulators?

23 MR. NICHOLS: This is the --

24 If I can go to the next slide, please.

12:04:31 25 First of all, Judge, this just illustrates the

1 bases that they need to follow. So, they got to get -- standing  
2 gets them to first base, violation gets them to second base,  
3 repeat or ongoing gets them to third base; and then, they got to  
4 show an appropriate remedy before they even get to the point of  
12:04:52 5 asking the Court for appropriate remedy here at home plate.

6 Next slide.

7 Why are citizen suits limited? And, again, you  
8 heard a fundamental disagreement between the two sides as to  
9 whether citizen suits are limited or not. I think the Supreme  
12:05:08 10 Court of the United States has said that they are limited. And  
11 this is a case -- one of the leading cases -- this is a Clean  
12 Water Act case, Judge, but it relates to a citizen suit  
13 provision under the Clean Water Act. And so the general  
14 principle behind citizen suits and what they are intended to do  
12:05:26 15 and what they are not intended to do is set forth in this case.

16 THE COURT: Give me a moment. Let me read it. Then  
17 you can point out -- I'll read over it just a moment.

18 Okay, go on.

19 MR. NICHOLS: So just reading this language, it's  
12:06:20 20 difficult to understand how somebody could read this language  
21 and say that the citizen suit remedy is unlimited because what  
22 the Supreme Court is saying is that the citizen suit has a  
23 supplementary role. It has an interstitial role. It should not  
24 be potentially intrusive.

12:06:41 25 And the example that the Supreme Court uses in



1 this very case overlaps with what the Court has asked about  
2 these events, these more serious events that do involve large  
3 amounts of emissions that get reported through the STEERS system  
4 to the regulator.

12:06:55 5 So here, they're talking about the administrator,  
6 EPA. So, suppose that the EPA agreed not to assess or otherwise  
7 seek civil penalties on the condition that the violator take  
8 some extreme corrective action, such as to install particularly  
9 effective but expensive machinery that it otherwise would not be  
12:07:13 10 obliged to take. So, what the Supreme Court is saying is the  
11 citizen suit is not intended to come in and undercut --

12 THE COURT: Has your client done that?

13 MR. NICHOLS: Yes, absolutely. And I'm going to --  
14 we're going to -- we're going to take you on a virtual tour of  
12:07:27 15 the plant and show you some of the equipment.

16 THE COURT: What they've done?

17 MR. NICHOLS: Yes, sir. So what the Supreme Court has  
18 said is that, you know, again, we're beyond the motion to  
19 dismiss, we're beyond the motion for summary judgment.

12:07:39 20 THE COURT: We're in trial.

21 MR. NICHOLS: We're in trial. And so, of course, as  
22 the Court says, you can get to trial by second-guessing; but  
23 then, when you get to trial, then the Court gets to decide  
24 whether your second-guessing is appropriate or not. And that's  
12:07:49 25 exactly what the Supreme Court said in this case.

1 Next slide.

2 The overview, Judge, of the regulations. So,  
3 you've got the Baytown Complex down here in Baytown. And the  
4 Baytown Complex regulation is through two entities. That's the  
12:08:08 5 EPA, the administrator, that word that you picked up on from the  
6 statute, and the TCEQ through this SIP, or State Implementation  
7 Plan, that we talked about. So there's a relationship that runs  
8 between these two agencies.

9 Next.

12:08:20 10 And that is what the Court will recognize as what  
11 the Courts have said is cooperative federalism.

12 THE COURT: By the way, the Defense -- the Defense had  
13 just a minute short of an hour. So you've got another 20  
14 minutes. Okay.

12:08:34 15 MR. NICHOLS: So cooperative federalism is a -- is a  
16 term that the Court is familiar with. And what that means is  
17 that federal authorities and state authorities work together in  
18 this area to enforce the Clean Air Act.

19 As the Court has already picked up on, the EPA  
12:08:51 20 supervises the program. That SIP is submitted for approval by  
21 the EPA. And also, there's a situation which you -- you'll hear  
22 about in the evidence of the case, something called overfiling.  
23 So that is even --

24 THE COURT: Known as what?

12:09:04 25 MR. NICHOLS: Overfiling. So, even if TCEQ is

1 delegated authority, the primary authority to enforce the Clean  
2 Air Act in the State of Texas, the EPA as you heard about this  
3 morning, as an example with the consent decree and the refinery  
4 initiative, the EPA can overfile.

12:09:26

5 In other words, if they're not happy with how  
6 TCEQ handles something, they can come in over TCEQ's shoulder.  
7 Okay. So then how do we go down to the plant? So we got both  
8 TCEQ and the EPA overseeing the operations of that complex.

12:09:41

9 How do they do that? TCEQ, we've talked about  
10 the permitting. We've talked about the reports and the record  
11 review. And we have a very different view, your Honor, what the  
12 evidence is going to show in terms of what the TCEQ does with  
13 the records that it receives, inspections that occur at that  
14 facility; enforcement activities by -- of the type that the  
15 Supreme Court talked about in Gwaltney, G-w-a-l-t-n-e-y;  
16 penalties and corrective actions that are imposed as part of the  
17 TCEQ requirements.

12:10:05

18 And the Plaintiffs are going to belittle these,  
19 Judge. There's no doubt about it. But you're going to hear the  
20 evidence of what the TCEQ has actually done with respect to the  
21 Baytown Complex.

12:10:24

22 Next.

23 The EPA also is involved in the permitting  
24 process, has certain enforcement initiatives like the refinery  
25 initiative that came into play in this case, and they have the

12:10:39

1 ability to pursue their own actions against the facility if they  
2 determine that's appropriate.

3 Next.

4 And then back in return, what does the complex do  
12:10:50 5 with respect to these environmental regulators?

6 Next.

7 Provides these reports that the Plaintiffs have  
8 compiled and sought to throw against the wall.

9 Records. Access to the facility. Penalty  
12:11:10 10 payments. Compliance with enforcement orders. All of these  
11 things are -- you'll hear evidence, are running between the  
12 complex and the TCEQ.

13 Next.

14 There are certain reports that get filed  
12:11:25 15 federally. Certain records that are made available federally.  
16 Access that has to be made under provisions of law to EPA  
17 investigators. Penalty payments and compliance with the consent  
18 decrees like the one that you know was involved in this case.

19 So, all of that overlay over to the Baytown Complex is precisely  
12:11:47 20 why the citizen suit is an interstitial, non-intrusive remedy.

21 That's what it's supposed to be. But what the  
22 Plaintiffs are doing is they are trying to deride, they are  
23 trying to criticize the amount of work that TCEQ and the EPA  
24 does in regulating this facility. And the reason why they are  
12:12:09 25 going to be going after TCEQ and EPA is for this very reason,

1 that they do, in fact, recognize that the citizen suit remedy is  
2 limited and they should only be here in federal court asking for  
3 this Court to intervene if for some reason this system has  
4 failed.

12:12:25 5 Next slide.

6 You asked about some data, Judge, and I believe  
7 that the representation was made to you that the number of  
8 reportable events had stayed flat across these plants when, in  
9 fact, as you will see from the evidence in the case that from  
10 the beginning of the period where they're alleging -- if you'll  
11 recall, they filed this lawsuit in 2010, December of 2010.

12 They get to go -- they didn't file -- they filed  
13 the lawsuit here. When they file a lawsuit, they get to look  
14 back for five years and two months which is why the time period  
15 starts, as Mr. Nicholas said, on October 14 of 2005. Then  
16 through Magistrate Judge Smith, we arrived at a cut-off period  
17 for the case. In other words, we got here to September the 3rd  
18 of 2013. So, at the end of the day, we're talking about a  
19 period that as, Mr. Nicholas said, is about eight years. And  
20 over those eight years, you're going to see evidence of a  
21 significant number of decline in reportable events in the  
22 facility.

23 THE COURT: Well, what are these two graphs? You have  
24 a broken line and a solid line.

12:13:38 25 MR. NICHOLS: Yes, sir. This is the actual data on

1 reportable events that occurred across these plants, and this is  
2 not just with respect to the events that are still in the case.  
3 This is everything. So if you plot these data lines, then you  
4 get this trend line which is the dotted line that allows you to  
5 evaluate what kind of a trend are we seeing over the years.

12:13:56

6 THE COURT: So that answers -- at least from your  
7 point of view, the question is has it improved at all?

8 MR. NICHOLS: Absolutely. And there's going to be --  
9 we're going to spend a lot of time with slides like this, Judge,  
10 that will show the Court from our perspective the improvement  
11 that has been made.

12:14:09

12 THE COURT: So you're saying there was a decline of 81  
13 percent over the life of this case.

14 MR. NICHOLS: Yes, sir.

12:14:18

15 Next slide.

16 Then I think you were told that the emissions  
17 continued to be flat or increase. You're going to hear  
18 evidence, Judge -- these boxes up here, these are what the --  
19 what are classified as what are called criteria pollutants,  
20 c-r-i-t-e-r-i-a. And these are the pollutants that are the  
21 regulated. They include the VOCs that Mr. Nicholas mentioned,  
22 carbon monoxide, nitrogen oxides, sodium dioxide and particulate  
23 matter, sulfur dioxide, I'm sorry. So, with respect to these  
24 matters, these criteria pollutants, look at the trend line as  
25 well. From 2006 all the way down to 2013, you're seeing

12:14:37

12:15:05

1 reductions in the magnitude of 95 percent in the reductions  
2 across that complex.

3 Next slide.

4 Then, your Honor, remember, we're here about  
12:15:24 5 permits. And permits, in essence, are a recognition. In other  
6 words, I don't think the Plaintiff environmental groups are  
7 going to take this position. Maybe they will. But I think  
8 everybody understands that industrial facilities of any type are  
9 going to have emissions. The system recognizes that that's what  
12:15:47 10 a permit does. It permits a certain amount of emissions. In  
11 other words, it sets forth an expectation as to what a  
12 facility's emissions would be in any given year.

13 THE COURT: Now, is that the gray?

14 MR. NICHOLS: That's the gray. So, you got the gray  
12:16:02 15 bar broken down for each year, 2006 all the way through 2012.  
16 So, you've got -- the emissions would be the entirety of gray.  
17 Then you see at the bottom of the key, this is the permitted  
18 emissions. That is, these are the emissions that occurred in  
19 the ordinary course of operation of the facility.

12:16:21 20 THE COURT: What do you mean by permitted?

21 MR. NICHOLS: That means that when you have permits,  
22 you have permit limits for certain types of criteria pollutants,  
23 the ones listed up here in these blue boxes. So, in other  
24 words, the permit has a permitted level, an expectation of how  
12:16:38 25 much in volatile organic compounds the facility will issue or

1 emit in any particular year. And so that -- when you add all  
2 those together, you come up with an amount, an expectation, a  
3 regulatory expectation that the facility is going to be emitting  
4 that amount. So, for example --

12:16:59 5 THE COURT: No, I got it. I got it.

6 MR. NICHOLS: You got it.

7 THE COURT: Let's look at the differentiation between  
8 the gray, the beige, and the orange.

9 MR. NICHOLS: Yes, sir. So you got the gray. That's  
12:17:12 10 the total. Then the beige is the total emissions for that  
11 particular year that the Plaintiffs aren't raising any issue  
12 about. These are permitted emissions.

13 THE COURT: Are they raising anything about the grays?

14 MR. NICHOLS: They're not raising anything about the  
12:17:25 15 grays, not in this case.

16 THE COURT: Or the -- or the beige?

17 MR. NICHOLS: Not in this case.

18 THE COURT: Or the beige?

19 MR. NICHOLS: Not in this case. I think we --

12:17:29 20 THE COURT: I'm talking about this case.

21 MR. NICHOLS: Yeah, yeah. No, I don't think they're  
22 raising anything about it in this case. They might raise it in  
23 another context. They may think that these levels are too high,  
24 but that's not an issue for this Court. So we've got the beige,  
12:17:43 25 which is the permitted emissions. Those are the emissions that



1 occur in the ordinary course.

2 THE COURT: According to you, there's no -- nothing  
3 wrong with either the gray or the beige.

4 MR. NICHOLS: Correct. And, so, what we're dealing  
12:17:53 5 with in this case at most -- and these graphs are actually  
6 overstated because this includes all of them, including the ones  
7 that have been knocked out of the case by the Court.

8 So even if you were to disregard what the Court  
9 has knocked out of the case, these orange slivers for each of  
12:18:07 10 these years are what the Plaintiffs are raising in the case.  
11 And the bottom line, Judge, is that for each and every one of  
12 these years, the Baytown Complex, despite the claims that it's  
13 irresponsible, that it's shoddily run, that they don't know what  
14 they're doing out there, whatever other things they want to say,  
12:18:30 15 is operating at a level where you can see it's been 50 percent  
16 or less total emissions from ordinary operations and from  
17 upsets, total emissions have been far below, 50 percent down to  
18 levels that are approaching 25 percent of what the regulatory  
19 expectation is of what the amount of these pollutants is going  
12:18:54 20 to be emitted every year. And, again, Judge, this goes back to  
21 the false premise that underlies the case, which we'll get into  
22 in the trial that somehow --

23 THE COURT: You've got about ten minutes left.

24 MR. NICHOLS: -- facilities cannot do any emissions.  
12:19:07 25 But this is not all, Judge. So, if I can just show you real

1 quick --

2 THE COURT: I'm sure it's not all.

3 MR. NICHOLS: Can we go to 2A? So you're going to see  
4 again numbers like this showing the decline in reportable  
5 events.

12:19:34

6 And then the next slide, please.

7 And, Judge, these are the reportable events that  
8 still are in the case. When you take away all the ones that the  
9 Court has taken away -- which I disagree with the suggestion  
10 that it's only a few that the Court has done; the Court has  
11 dismissed 130 some-odd reportable events under its prior  
12 rulings -- you get down to the 240 which, again, if we were  
13 focused on those and, more specifically, if we were focused on  
14 specific ones of those that the Plaintiffs felt like they had  
15 standing to raise and that they felt were truly repeated or  
16 ongoing, we would be spending a lot less time than the three  
17 weeks that we think we're going to be spending here during the  
18 trial.

12:19:46

12:20:06

19 2B, please.

20 You saw this slide earlier, and we're going to be  
21 showing you lots more slides.

12:20:31

22 Next one, please.

23 Next one. These are for all the different  
24 criteria pollutants, Judge.

12:20:45

25 Next.

1 NOx.

2 THE COURT: What's NOx?

3 MR. NICHOLS: That is Nitrogen Oxide, your Honor. And  
4 particulate matter, the soot that we talked about earlier,  
12:20:59 5 you're going to see the trend lines that show a very high level  
6 of environmental performance at the Baytown Complex.

7 Is the Baytown Complex capable of avoiding every  
8 upset event? No. Is any facility in the United States, in the  
9 world capable of avoiding all upset events? The answer to that  
12:21:21 10 is no. No one who operates a facility like this one with a  
11 complexity that it has is capable of doing that. So you are  
12 going to have those.

13 And you are going to have situations, Judge,  
14 where during the course of one of those upsets you violate an  
12:21:37 15 hourly limit, for example. So, if you look not at the annual  
16 limits but at the hourly limit, you're going to see some of  
17 those violations and you will hear about some of those in this  
18 case.

19 The suggestion that we are saying that these are  
12:21:49 20 not serious matters is -- falls of its own weight. All matters  
21 relating to the operation of this complex are extremely serious  
22 to the men and women who work at the Baytown Complex.

23 Your Honor, the reason why you don't see these  
24 cases being tried very often is because the normal business  
12:22:14 25 model is that environmental groups will put together these

12:22:34 1 numbers. They will go out after they've put the numbers  
2 together, which I think you will hear evidence about how this  
3 case came to be. After they put the numbers together, they go  
4 out and try to find somebody that they say can -- was affected  
5 by at least one of the numbers on their charts.

6 They hold a press conference. And then because  
7 of the nature of these cases, they often will settle; and  
8 they'll settle in consent decrees that, by the way, do not  
9 embody a standard of perfection, even the settlement agreements  
10 that the Plaintiffs have entered into --

11 THE COURT: And there have been some.

12 MR. NICHOLS: There have been. And the ones they've  
13 entered into -- for example, you're going to hear about one they  
14 did with Shell, Deer Park. You're going to hear about one they  
15 did with Chevron Phillips, the C. P. Chem plant out there on  
16 I-10. You've probably driven by it a thousand times going  
17 towards Beaumont.

18 These consent decrees don't embody a standard of  
19 perfection. They don't embody a standard of no upset events.  
12:23:26 20 And as a matter of fact, Judge, you are going to see evidence in  
21 the case that the Plaintiffs have crowed about the results  
22 they've gotten with Shell and C. P. They've held press  
23 conferences. They've said what a great job they're doing for  
24 the environment.

12:23:37 25 THE COURT: Is that Crown Petroleum?

1 MR. NICHOLS: That's -- no, that's Chevron Phillips,  
2 Judge.

3 THE COURT: Chevron Phillips.

4 MR. NICHOLS: They've touted these results that they  
12:23:48 5 have achieved as being environmentally responsible in terms of  
6 the results that have been achieved. You are going to see  
7 evidence, Judge, that without a consent decree, without a need  
8 for Environment Texas or Sierra Club to bring this case, that  
9 the men and women at the Baytown Complex have exceeded the  
12:24:04 10 results achieved under those consent decrees.

11 So for all these reasons, Judge, we ask you -- we  
12 appreciate and we thank you for giving us the time that you've  
13 given us because we believe the case is going to be very  
14 interesting; and it's a very important case to determine, if you  
12:24:22 15 want to bring a citizen suit case under the Clean Air Act, you  
16 want to bring it to federal court, what you need to be prepared  
17 to show at trial.

18 Thank you, judge.

19 THE COURT: Thank you.

12:24:33 20 Thank you both sides. I'm going to take about  
21 two minutes here, and then you're going to call your first  
22 witness.

23 MR. NICHOLS: Your Honor, at this time we would like  
24 to invoke the rule.

12:25:30 25 THE COURT: All right. We'll do it as soon as we get

1 underway.

2 MR. NICHOLAS: Which rule is that, your Honor?

3 THE COURT: The rule. The rule referring to  
4 sequestration of witnesses.

12:25:39 5 MR. NICHOLAS: Just wanted to make sure I knew.

6 THE COURT: The generic rule.

7 MR. NICHOLAS: Well, I wanted to make sure I was in  
8 the same generic rule.

9 Your Honor, will that rule also apply to expert  
12:25:53 10 witnesses?

11 THE COURT: No, I never -- I don't have expert  
12 witnesses or, what is it, corporate representatives or --

13 MR. NICHOLAS: Can we designate our corporate  
14 representatives?

12:26:05 15 THE COURT: We'll talk -- yeah, we'll get that back on  
16 the record.

17 (Court recessed at 12:26 p.m.)

18 (Court resumed at 12:37 p.m.)

19 THE COURT: Plaintiff call your first witness.

12:37:24 20 MR. NICHOLAS: Your Honor, we would like to designate  
21 the two --

22 THE COURT: Hold it. The rule's been invoked.  
23 Everyone who anticipates being called as a witness in this case  
24 at this time, everyone please stand if you're -- expect to be  
12:37:34 25 called as a witness wherever you're sitting.

1 Okay. Raise your right hand to be sworn.

2 (Several witnesses were sworn.)

3 THE COURT: All right. Have a seat for a moment to  
4 see whether this pertains to you. All right. The rule --

12:37:56 5 actually, the rule concerning sequestration of witnesses has  
6 been invoked. That means anyone who is not a party to the  
7 lawsuit, meaning a designated representative of either the  
8 Plaintiff or the Defendant or -- and I always have done this in  
9 state court, exempted the expert witnesses.

12:38:11 10 Anyone falling into that category must remain  
11 outside until he or she is called to testify. And once you're  
12 called to testify, you'll be released from the rule and you can  
13 remain in the courtroom. However, while you're excluded from  
14 the courtroom, you're not to discuss this case with anyone,  
12:38:30 15 including other witnesses or anyone else, except you may discuss  
16 the case, if you want to, just with the attorneys in this case.

17 Anyone falling into that category with the help  
18 of the attorneys right now, please step outside.

19 I don't think anyone at this time needs to step  
12:38:55 20 outside.

21 MR. NICHOLS: There was one, Judge. I think she's  
22 left.

23 MR. NICHOLAS: Just for the -- yes, one has left. And  
24 just for the record, we'd like -- the Plaintiffs would like to  
12:39:03 25 designate Luke Metzger as the corporate representative.

1 THE COURT: Any objection?

2 MR. NICHOLS: No, your Honor.

3 MR. NICHOLAS: And Neil Carman for Sierra Club.

4 THE COURT: Okay. So we have two corporate  
12:39:10 5 representatives?

6 MR. NICHOLAS: Yes, sir.

7 THE COURT: All right, no problem.

8 I'm also going to ask the attorneys, now that the  
9 rule has been invoked and we all know the boundaries, that if  
12:39:17 10 you see a witness coming in of yours or even if it's the other  
11 side, mention it to the other side, just come around and mention  
12 it to them, go out and inform them of the rule.

13 Then if you need me to swear them in specifically  
14 and to give them that admonition also, if you have any witness  
12:39:35 15 -- I don't want witnesses hanging out in the hallway. I don't  
16 think that's fair. So, if there's a timing question, if they're  
17 here under subpoena and need an instanter or for a certain date,  
18 bring them in. I'll swear them in, and then they can come back  
19 as you notify them by phone so they don't sit out here for a day  
12:39:56 20 and, you know, wait five or six hours to be called. All right.

21 MR. NICHOLAS: Your Honor, one other preliminary  
22 matter which is the matter of notice. In citizen suits  
23 Plaintiffs give notice to the Environmental Protection Agency,  
24 in this case TCEQ, prior -- 60 days prior to -- at least 60 days  
12:40:18 25 prior to filing suit and afterwards a copy of the complaint is



1 provided to the Department of Justice.

2 That was done in this case. It was done by  
3 actually Mr. Kratka; and we have submitted an affidavit, made it  
4 as part of the record, part of the exhibits. It's not an issue  
5 in this case; but rather than -- it's not a contested issue in  
6 this case rather than -- so anyway we would like -- this is --

7 THE COURT: I'll take judicial notice. What exhibit  
8 number?

9 MR. NICHOLAS: 395.

10 THE COURT: 395?

11 MR. NICHOLAS: 395.

12 THE COURT: Any objection?

13 MR. NICHOLS: No, your Honor.

14 THE COURT: Now, Mr. Nicholas when you speak, you need  
15 to get a microphone pulled all the way over to you, okay? There  
16 are a couple -- aren't there microphones at that table? There  
17 should be. In other words, pull it -- pull it in to you. You  
18 don't have to pull it into you.

19 MR. NICHOLAS: I understand.

20 THE COURT: Pull it. You can -- okay. Yeah, you can  
21 pull it in, and you can pull it to the front so you're sort of  
22 speaking. Yeah, I just need it to pick up. You don't have to  
23 speak right into it. I just want it to pick up as you, you  
24 know, visit with your, what is it, with your witnesses.

25 All right, Counsel, call your first witness.

Cottar - Direct/Kratka

1 MR. KRATKA: Plaintiffs call Richard Shae Cottar.

2 THE COURT: Okay. Yes, sir. Did he step outside  
3 already?

4 Federal court, you need to get somebody to do it.

12:41:50 5 Mr. Kratka, you're going to need the microphone now.

6 MR. KRATKA: How about if I use this one?

7 THE COURT: Yes, sir.

8 Have a seat. By the way, if I forget or if Ellen

9 forgets to turn the lights off when you're using overheads, if  
10 you need it, let us know if we forget. I have a light switch  
11 here, and she's got one down there.

12 Go right ahead.

13 MR. KRATKA: Thank you, your Honor.

14 (The witness, **RICHARD SHAE COTTAR**, called on behalf of the  
15 Plaintiff, was previously sworn.)

16 DIRECT EXAMINATION

17 BY MR. KRATKA:

18 Q Please state your name for the record.

19 A Richard Shae Cottar.

12:42:29 20 Q And, Mr. Cottar, are you currently a member of the Sierra  
21 Club?

22 A I am.

23 Q And when did you first join the Sierra Club?

24 A Fall of 2010, probably September, October.

12:42:37 25 THE COURT: Mr. Cottar, it's K-o-t-t-e-r?

Cottar - Direct/Kratka

1 THE WITNESS: C-o-t-t-a-r.

2 THE COURT: C-o-t-t-a-r. First name?

3 THE WITNESS: Richard.

4 THE COURT: Okay, thank you.

12:42:48 5 BY MR. KRATKA:

6 Q And when you say you joined Sierra Club, did you do that by  
7 paying a membership fee?

8 A Yes.

9 Q And over the years -- and over the years since you first  
10 joined in 2010, have you renewed your membership fee?

11 A Yes.

12 Q Several times?

13 A Yes.

14 Q How did it come about that you joined Sierra Club in the  
15 first place?

16 A It was --

17 THE COURT: Where do you reside, sir?

18 THE WITNESS: I live in Baytown, Texas.

19 THE COURT: Okay, thank you.

12:43:17 20 THE WITNESS: A couple of different factors all sort  
21 of came at the same time. I guess the shortest answer is that I  
22 had a lot of friends that were involved in different  
23 environmental organizations. And the Sierra Club was the one  
24 that I kept hearing the most about.

12:43:35 25 And at that point I was sort of new to, I guess,

Cottar - Direct/Kratka

1 thinking environmentally. It's still fairly not that -- I  
2 wouldn't consider myself an environmentalist, if I can say it  
3 that way; but I believe that the work they are doing is  
4 important and decided to invest myself in that direction.

12:44:05

5 BY MR. KRATKA:

6 **Q** And do you recall when you first learned about this lawsuit  
7 or the possibility of this lawsuit?

8 **A** It was probably -- it was about the same time, October,  
9 September of 2010.

12:44:17

10 **Q** And how did you hear about the possibility of this lawsuit  
11 in October of 2010?

12 **A** I had earlier that year in April moved -- I've lived in  
13 Baytown my whole life -- moved to a townhouse that was right  
14 across the street from both the chemical and the olefins plant  
15 and immediately started noticing things that were very different  
16 than my experiences living in the Baytown community for the  
17 previous, you know, 30 some-odd years, realized that it was a  
18 different experience living right next door. And at the time I  
19 was working for an organization, environmental organization in  
20 Houston, Air Alliance Houston.

12:45:09

21 THE COURT: Which group?

22 THE WITNESS: Air Alliance Houston.

23 THE COURT: What's your educational background, sir?

24 THE WITNESS: Bachelor's degree in communications.

12:45:19

25 THE COURT: From?

Cottar - Direct/Kratka

1 THE WITNESS: East Texas Baptist University.

2 And I was employed there as their communications  
3 director. That was sort of my first entrance into  
4 environmentally-astute thinking, I guess. And honestly, my  
12:45:38 5 experience was so drastically different than, like I said, the  
6 previous 30 some-odd years.

7 The executive director at Air Alliance Houston  
8 came to me and said, "Hey, I heard about some people that are  
9 getting together for some sort of a legal action against Exxon.  
12:46:01 10 Are you interested?" And at that point he had heard me  
11 articulate several issues, living right across the street. And  
12 I said, "Absolutely. I would love to explore anything that can  
13 be done to help correct these issues."

14 BY MR. KRATKA:

12:46:17 15 Q Okay. I'm going to ask you a bunch of questions to get  
16 into the details --

17 A Okay.

18 Q -- of the general topics you've mentioned. Now, you  
19 mentioned you've lived in Baytown most of your -- all of your  
12:46:26 20 life, most of your life?

21 A Since I was three. At this point that's 38 years.

22 Q And there were -- were there any periods of time when you  
23 didn't live in Baytown?

24 A Before I was -- before three, yeah. And there was about a  
12:46:43 25 three and half year stretch where I lived in Marshall, Texas,

Cottar - Direct/Kratka

1 while I attended East Texas Baptist University but my residence  
2 was always in Baytown.

3 **Q** And where do you currently live in Baytown?

4 **A** 1008 Wright Boulevard.

12:46:58 5 **Q** For how long have you lived there?

6 **A** About a year and half.

7 **Q** Where did you live immediately prior to the Wright  
8 Boulevard address?

9 **A** Immediately prior to that, for a period of about two and  
12:47:07 10 half years, I lived at 3206 Briar Court which is in the Shady  
11 Hill Villa subdivision of townhouses.

12 THE COURT: About how far away from the plant?

13 THE WITNESS: About a quarter of a mile.

14 MR. KRATKA: Your Honor, I am going to pull out a map,  
12:47:22 15 and we'll see exactly where it was.

16 THE COURT: That's all right.

17 BY MR. KRATKA:

18 **Q** Now, just before I do that, do you roughly know the dates  
19 of the times you lived at Briar Court?

12:47:28 20 **A** Yes, Briar Court, I moved to that facility -- to that  
21 residence around April of 2010, and I believe we closed on our  
22 house moving away from that facility -- from that residence late  
23 -- I think it was August 31st of --

24 THE COURT: You say "we." Just for the record, who do  
12:48:00 25 you mean, sir?

Cottar - Direct/Kratka

1 THE WITNESS: My wife and I and our kids.

2 THE COURT: How many children?

3 THE WITNESS: Three.

4 THE COURT: Thank you.

12:48:08 5 THE WITNESS: 2012. August or September is probably  
6 about the time we moved out. So September of 2012.

7 BY MR. KRATKA:

8 Q All right. I'm going to put a map of Baytown on the  
9 projector here and hopefully it will show up properly on the  
10 screen. Does something need to be done to activate?

11 THE COURT: Oh, yeah. Yeah. Hang on.

12 BY MR. KRATKA:

13 Q Sorry, I don't have the advanced graphics that we saw  
14 during the Defendants' presentation.

12:49:06 15 Mr. Cottar, can you --

16 THE COURT: First of all, what are those major  
17 thoroughfares, please?

18 MR. RICE: Your Honor, may I just take a look at this  
19 exhibit?

12:49:17 20 THE COURT: Sure.

21 MR. KRATKA: Yeah. I'm sorry. This is Exhibit -- I  
22 apologize. This is this Plaintiffs' Exhibit -- and we're  
23 pulling out the number. Since it's an actual map, we will  
24 provide -- it was not in the physical notebook that we provided  
12:49:49 25 to the Court but we can give the Court -- we'll actually give

Cottar - Direct/Kratka

1 this map.

2 THE COURT: Any objection?

3 MR. RICE: It's marked as an exhibit. No objection.

4 THE COURT: Mark it as an exhibit, and then it will be  
12:50:01 5 entered without objection. Okay?

6 MR. KRATKA: All right. We'll get to -- we'll work  
7 out the number.

8 THE COURT: Just tell me about it later and make sure  
9 my case manager knows. That's really important.

12:50:09 10 All right. What are we looking at here? What's  
11 the thoroughfares here?

12 BY MR. KRATKA:

13 Q First of all, can you tell -- Mr. Cottar, can you identify  
14 where the Baytown facility is?

12:50:21 15 A Absolutely.

16 MR. KRATKA: Your Honor, may I walk over there?

17 THE COURT: Sure. Just speak loud enough where the  
18 court reporter picks it up, please.

19 THE WITNESS: This is the facility here. This is 330,  
12:50:33 20 Spur 330. Up there is I-10.

21 THE COURT: Where is I-10?

22 BY MR. KRATKA:

23 Q It would be up above where we could see it?

24 A That top most red line.

12:50:44 25 THE COURT: That's I-10, the red line?



Cottar - Direct/Kratka

1 THE WITNESS: Yes, sir.

2 MR. KRATKA: I actually think I-10 may be a little  
3 farther north than that.

12:50:56

4 THE COURT: All right. So I-10 is north because  
5 that's at the top of the map, off the map, right?

6 THE WITNESS: Correct.

7 THE COURT: And which -- and if you go right, you're  
8 going toward Galveston? Is Galveston to the right?

9 MR. KRATKA: Galveston would be south.

12:51:07

10 THE COURT: Well, I-10 --

11 THE WITNESS: To Beaumont.

12 THE COURT: I-10 is going to Beaumont. Beaumont is to  
13 the right.

14 THE WITNESS: Correct?

12:51:11

15 THE COURT: Is that correct?

16 THE WITNESS: Yes, sir.

17 THE COURT: Okay. Got it. Now go on.

18 BY MR. KRATKA:

12:51:19

19 **Q** All right. So can you identify generally where the Baytown  
20 complex is on this map?

21 **A** Yes, sir. It's this general -- whole general area there.

22 MR. KRATKA: If the record would reflect that the  
23 witness is referring to that largely blank area as it appears on  
24 the map.

12:51:32

25 THE WITNESS: Yes. Within the bounds, typically, of

Cottar - Direct/Kratka

1 this line here.

2 THE COURT: What's that line? Oh, I see. I see what  
3 you're talking about.

4 BY MR. KRATKA:

12:51:42 5 Q And can you identify for the Court where your current  
6 address is?

7 A My current address is right about here.

8 Q And can you estimate, not by using the map. Do you know  
9 roughly how far away your house is from the fence line of the  
10 plant?

11 A A couple of miles.

12 Q And can you identify where your previous address was on  
13 Briar Court?

14 A Yes, it's right here.

12:52:13 15 THE COURT: So, you've lived right close to the  
16 boundary of the plant for how many years?

17 THE WITNESS: Roughly two and half.

18 THE COURT: So you moved within -- you moved and then  
19 moved again?

12:52:24 20 THE WITNESS: Correct.

21 THE COURT: Okay.

22 BY MR. KRATKA:

23 Q And you mentioned that you have a wife and three children?

24 A Yes.

12:52:38 25 Q Do they live with you all the time?

Cottar - Direct/Kratka

1 **A** The three kids live with me 50 percent of the time. They  
2 live with their mother the other 50 percent.

3 **Q** Is that true during your residences at both of these  
4 addresses?

12:52:50 5 **A** Yes.

6 **Q** Okay. Let me direct your attention now to the -- I'm going  
7 to ask you some questions about the time when you lived on Briar  
8 Court directly -- the nearer location to the plant.

9 **A** Sure.

12:53:05 10 **Q** I may have missed. Did you say how far from the plant you  
11 thought that Briar Court was?

12 **A** Quarter of a mile from the fence line.

13 **Q** Do you know which part or which plants in the Baytown  
14 Complex were closest to your residence?

12:53:19 15 **A** The -- that residence is very close to the fence line that  
16 separates Baytown olefins from Baytown chemical. So, to say  
17 which one I was closest to, I was probably slighter closer to  
18 the Baytown olefins plant but within a matter of feet.

19 **Q** Okay. And did you ever have any concerns about air quality  
12:53:47 20 living in proximity to the Exxon plant?

21 **A** Before I moved there no more than, you know, living in  
22 Baytown almost 40 years.

23 **Q** And what happened after you moved there?

24 THE COURT: Which one? There's two moves.

12:54:01 25 MR. KRATKA: We're talking about the move to -- the

Cottar - Direct/Kratka

1 first of the two addresses that we'll be discussing which is the  
2 Briar Court address.

3 THE COURT: Thank you.

4 BY MR. KRATKA:

12:54:10 5 Q When you moved to -- after you moved to Briar Court, did  
6 you have any concerns about air quality?

7 A You know, when I first moved to Briar Court in April of  
8 2010, my prior concerns were the smell that Baytown has that's  
9 always been associated with Baytown -- with Exxon. After I  
10 moved --

11 THE COURT: Did you say Baytown or Exxon?

12 THE WITNESS: Exxon.

13 THE COURT: Okay.

14 THE WITNESS: The -- however, after I moved, it wasn't  
12:54:52 15 but a matter of weeks before I experienced what the residents  
16 around that area experience and what they knew. At that point  
17 they included me, as well. The really loud noises that come  
18 from the flares. The upsets that happen, the physical upsets  
19 that happen to the community when these flares go on for  
12:55:25 20 prolonged periods of time. The questions, the unanswered  
21 questions that the community -- that we have when these things  
22 happen and everybody is saying, "What's going on?" And nobody  
23 can tell us. Nobody knows if we should run for our lives or  
24 shelter in place or what.

12:55:40 25 //

Cottar - Direct/Kratka

1 BY MR. KRATKA:

2 **Q** Did you ever experience any odors living at the Briar Court  
3 address?

4 **A** I did.

12:55:46 5 **Q** And were you able to -- do you believe those odors were --  
6 any of those odors were associated with the Baytown -- the Exxon  
7 complex?

8 **A** Yes.

9 MR. RICE: Objection. Leading and speculation.

12:56:01 10 THE COURT: Sustained.

11 BY MR. KRATKA:

12 **Q** Let me backtrack then. Did you ever witness any flaring  
13 events --

14 **A** I did.

12:56:06 15 **Q** -- while living there?

16 And can you describe -- do you know whether the  
17 flares that you viewed were part of the Exxon complex?

18 **A** I do.

19 **Q** And how do you know that?

12:56:19 20 **A** That's the only complex around.

21 **Q** Okay. And could you tell -- you testified a minute ago  
22 that you did experience odors while living there. Can you  
23 describe the nature of the odors that you were referring to?

24 **A** Sure. Within a few months after moving to that residence,  
12:56:48 25 probably late spring or early summer, May, June-ish, came home

Cottar - Direct/Kratka

1 one night, again referring to the map -- hopefully, I don't have  
2 to get up, but I will if I need to point it out -- I was coming  
3 up Rolling Brook Drive headed toward my residence, had the kids  
4 in the car. It was late at night. We got within about a half  
5 mile from the facility and --

12:57:15

6 **Q** So if you were coming down Rolling Brook, were you  
7 traveling from east to west?

8 **A** Traveling from sort of the northeast to the southwest.

9 **Q** Towards the plant?

12:57:27

10 **A** Towards the plant. And, you know, the kids said, "Oh, my  
11 God, dad, what's that smell?" Of course, my response was,  
12 "Well, it's Exxon." We get home, and the minute we open the  
13 doors it was really, really, really strong, so much that it just  
14 -- an immediate headache.

12:57:46

15 **Q** Can you describe what the odor was?

16 **A** It was very sweet. The only thing I can say to accurately  
17 describe it is both sweet and that it was just hitting me right  
18 here, like right in the sinus cavity. I don't know. I'm not a  
19 doctor, just know that I smelled it and it hurt.

12:58:06

20 **Q** It hurt to smell it?

21 **A** Yes.

22 **Q** And why did you say that -- when the children asked you  
23 what the odor was, why did you say, "It's Exxon"?

24 **A** It's sort of just common knowledge, if I can say it that  
25 way. In Baytown you smell smells, and people know it's Exxon,

12:58:23

Cottar - Direct/Kratka

1 or they say it's Exxon. There's --

2 THE COURT: Are there any other facilities in Baytown?

3 THE WITNESS: There's one on the far outskirts between  
4 Baytown and Mont Belvieu down I-10 several miles down the road.

12:58:43 5 THE COURT: Who is that?

6 THE WITNESS: Chevron.

7 BY MR. KRATKA:

8 Q That's several miles away?

9 A Ten miles or so.

12:58:49 10 Q And on this particular occasion, were the odors more  
11 intense or less intense or the same as you got closer to the  
12 Exxon facility?

13 MR. RICE: Objection, your Honor, to the leading  
14 nature of the question.

12:58:59 15 THE COURT: Overruled.

16 THE WITNESS: They were more intense, like I said,  
17 when we were going up Rolling Brook as we neared the facility.  
18 That's when the odor hit us, and we were pretty equidistant from  
19 whole -- from that point all the way around to our residence at  
12:59:12 20 that point.

21 BY MR. KRATKA:

22 Q Okay. And was this the only time you experienced odors  
23 while living at that address?

24 A No, sir.

12:59:24 25 Q And did you ever call anyone to complain about emissions or

Cottar - Direct/Kratka

1 odors while you were living at that address?

2 **A** I did. I did. That time in particular but several times  
3 after that.

12:59:41

4 **Q** Do you recall -- the first time you made a complaint call,  
5 do you recall who it was that you called?

6 **A** I did. Before I ever called any complaints in, I always  
7 called the CAER line.

8 **Q** What is the CAER line?

12:59:55

9 **A** It stands for Community Awareness Emergency Response line.  
10 To describe it, it's more of an answering service where  
11 community members can call and listen and see what's going on at  
12 facilities in the general area. When I say "general area," I  
13 mean I've heard stuff on there from Deer Park, LaPorte. It's a  
14 wide area. The idea is that when there's an upset that happens,  
15 some sort of emission event or flaring, that these facilities  
16 call, they leave a message.

01:00:16

17 They say either this is scheduled, it's  
18 unscheduled, it's maintenance, it's this, it's that. This is  
19 what's going on, and it's a way for the community to hear from  
20 their neighbors what's going on. Is this something that I  
21 should be worried about? Okay. Go on about our business.

01:00:38

22 **Q** And by "their neighbors," do you mean the industrial  
23 facilities that report?

24 **A** Yes, sir.

01:00:47

25 **Q** Is the CAER line something you or other citizens would call



Cottar - Direct/Kratka

1 simply to get information?

2 **A** Correct. There's no way to report anything. There's not  
3 anything to leave a message. It's just to hear from the  
4 facilities what's going on.

01:00:59 5 **Q** And did you call the CAER line --

6 **A** I did.

7 **Q** -- while you lived at Briar Court?

8 **A** Several times.

9 **Q** Did you ever call to actually make a complaint or ask a  
01:01:10 10 question to anyone about emissions or odors or these air quality  
11 experiences that you were describing?

12 **A** Sure. Absolutely. That particular time that I was just  
13 referring to I called Harris County Pollution Control.

14 **Q** Do you know what Harris County Pollution Control is, what  
01:01:28 15 government agency that is?

16 **A** I did. I had just heard about it, basically, because I was  
17 working at Air Alliance Houston. Having grown up in Baytown, I  
18 never knew there was any way of either asking questions or  
19 getting answers or making reports. So it was only by working  
01:01:47 20 there for the short time that I did that I knew this.

21 **Q** And what happened on that occasion and can -- do you recall  
22 when it was, the early summer of 2010?

23 **A** It was early summer of 2010.

24 **Q** What happened on that occasion when you called Harris  
01:02:07 25 County Pollution Control?

Cottar - Direct/Kratka

1 **A** Like I said, it was late at night. We were coming home  
2 from dinner. It was about 9:30ish. By the time I got the kids  
3 inside, it was --

4 THE COURT: Slow down a little bit, sir.

01:02:16

5 THE WITNESS: -- it was 9:45. And I called the  
6 Pollution Control line, and it put me over to their on-call  
7 investigator. It was a Friday night. So, at 9:45 on a Friday  
8 night, the investigator who lived in Galveston informed me that  
9 it was -- you know, he didn't have any equipment. He didn't  
10 have -- it was 9:45. So, he wasn't going to drive into the  
11 office and pick up equipment and come out but to call back  
12 Monday and let him know if it was still going on and they would  
13 investigate.

01:02:37

14 BY MR. KRATKA:

01:02:49

15 **Q** What happened after that? Did you call back?

16 **A** It was gone the next morning. There was no reason to call  
17 back anymore.

18 **Q** By "it," you mean the odor was gone the next morning?

19 **A** Correct.

01:02:58

20 **Q** Have you ever made any calls to the Texas Commission on  
21 Environmental Quality regarding air quality?

22 **A** Yes, sir. Multiple.

23 **Q** How many times would you say you called the TCEQ?

24 **A** I would say a conservative figure is probably six to eight.

01:03:13

25 **Q** And was the TCEQ -- and these were -- were you calling to

Cottar - Direct/Kratka

1 file complaints?

2 **A** Yes, sir.

3 **Q** And was the TCEQ responsive to your complaints?

4 **A** Not entirely. Occasionally. There were times when I got  
01:03:30 5 an investigator that came out several days later. Occasionally,  
6 there were times when I called and nobody was available to take  
7 a report. I just got a receptionist.

8 **Q** Were you able to even file a complaint on those instances?

9 **A** Eventually through their website, yes.

01:03:49 10 **Q** But you couldn't do it?

11 **A** But I couldn't do it over the phone.

12 **Q** And on the occasions when TCEQ sent an investigator out,  
13 can you just maybe be a little more specific about how quickly  
14 an investigator would show up?

01:04:05 15 **A** Earliest was typically three days. At the greatest was  
16 five days, six days.

17 **Q** And what would happen when an investigator did show up?

18 **A** The conversations that ensued were typically one of they  
19 realized that the event was no longer going on; that as an  
01:04:32 20 investigator, they were no longer investigating a live action  
21 but were just investigating the facts of what I experienced,  
22 would then go over to Exxon, investigate their paperwork to see  
23 if there was any correlation. And then they would get back to  
24 me.

01:04:50 25 **Q** Overall, were you satisfied with TCEQ's responsiveness to

Cottar - Direct/Kratka

1 your complaint?

2 **A** I was not.

3 **Q** Did you ever make your dissatisfaction or concerns known to  
4 the TCEQ?

01:05:00 5 **A** I did. I did. At one point I finally sat down, had a  
6 meeting with a couple of the investigators. Manuel Bautista was  
7 one of them. I don't remember the other gentleman's name but  
8 also their supervisor, Donna -- I can't remember her name but,  
9 yeah.

01:05:19 10 **Q** About when did that meeting take place, do you recall?

11 **A** That would have been fall of 2011, probably Septemberish,  
12 Octoberish.

13 **Q** And what was the result of that meeting?

14 **A** The result of that meeting was they gave me a Xeroxed blank  
01:05:42 15 form -- blank checklist for me to start taking like a log sheet  
16 of every time I smelled something of, you know, writing it down  
17 and eventually, you know, as I filled up the page, to give it  
18 back to them so that they could see a repeatable occurrence.

19 **Q** And did you fill out the log sheet?

01:06:03 20 **A** I did not.

21 **Q** Why not?

22 **A** It seemed pointless. I was calling, and if they're not  
23 keeping records of me calling, why am I keeping records? My  
24 calling should be a record. My -- the forms that I filled out  
01:06:17 25 online should be record. These should be record enough.

Cottar - Direct/Kratka

1 Q All right. Let's get back to your actual experiences with  
2 air quality while living on the Briar Court address. Did your  
3 concerns about -- and you may have already answered this, but  
4 did -- your concerns about air quality, were they more of a  
5 general nature, or did they focus on specific incidents?

01:06:37

6 A Can you rephrase that question or repeat it?

7 Q Sure.

8 A I don't understand it.

9 Q I apologize for the poor question. While you were living  
10 at the Briar Court address, did you have air quality -- concerns  
11 about air quality?

01:06:51

12 A Yes.

13 Q And were your concerns of a general nature or did your  
14 concerns focus on specific incidents?

01:07:05

15 A Specific events.

16 Q Okay.

17 THE COURT: Hang on one second. So, we got to stop  
18 sometime. I have about 1:08 on the clock as far as time goes.  
19 Let's take a lunch break at this time. Otherwise, we're just  
20 going to keep going without any break at all. I'd always  
21 usually in a jury take about an hour and 15 minutes, but -- so,  
22 usually it's from 1:00 to 2:15. It's now 1:08. We'll see you  
23 back ready to resume at 2:15. We'll see you at that time.

01:07:20

24 (Court recessed at 1:07 p.m.)

02:18:01

25 (Court resumed at 2:18 p.m.)

Cottar - Direct/Kratka

1 THE COURT: All right. Let's continue.

2 BY MR. KRATKA:

3 Q Mr. Cottar, I believe the last question I asked you was  
4 about whether there were concerns about air quality on Briar  
02:18:30 5 Court centered on any specific incidents.

6 A Yes, sir.

7 Q And your answer was?

8 A They do.

9 Q Can you describe in any more detail the types of air  
02:18:37 10 quality incidents that you are referencing?

11 A Certainly. Other than the one I already detailed early on  
12 in my experience, there was another incident.

13 Q Actually, if I could just stop you there. Rather than go  
14 incident by incident, if you could, give kind of a general idea  
02:19:01 15 for the Court of the types of experiences or odors or whatever  
16 it was that you were referring to.

17 A Sure. There were the odors. There were the flaring noises  
18 that -- in the townhouse on Briar Court, my bedroom windows  
19 faced the facility, the Exxon facilities. And there were --  
02:19:25 20 there were a number of times where the flaring was so profound  
21 that the windows in my bedroom actually shook. That's kind of  
22 alarming when it happens at any time but especially when it  
23 wakes you up at 2:00 or 3:00 in the morning. The flares  
24 themselves, the size, the black plumes of smoke.

02:19:47 25 Q Can you describe the odors with any more specificity?

Cottar - Direct/Kratka

1 **A** They were very similar to what I described earlier, very  
2 sweet most of the time. There was one particular event that was  
3 not a sweet smell. It was definitely an onion-type smell, but  
4 most of them were very sweet.

02:20:08

5 **Q** And could you tell where those smells were coming from?

6 **A** Definitely. From the Exxon facilities. I could tell  
7 because of the winds, basically. If the winds were moving from  
8 the east to the west and the flaring was going on, we wouldn't  
9 smell anything, but if the flaring was going on and the wind was  
10 moving from the west to the east and we did smell something,  
11 that was an indication, number one. Indication number two was  
12 then following up later, looking at those STEERS reports online  
13 on the TCEQ website and being able to correspond my experience  
14 with the record of the event.

02:20:51

15 **Q** And when you say when the wind is blowing from the west to  
16 the east, did -- the Baytown Complex was then located to the  
17 west of your house?

18 **A** Correct.

02:21:09

19 **Q** So you just mentioned checking STEERS reports. Do you know  
20 what pollutants were being released from Exxon when you  
21 associated one of your experiences with an incident at the  
22 plant?

23 **A** By looking at those STEERS reports, yes, sir.

24 **Q** How did you know about the STEERS reports?

02:21:22

25 **A** Again, through my work for the time when I was working at

Cottar - Direct/Kratka

1 Air Alliance Houston.

2 **Q** And how often would you say you checked the TCEQ website to  
3 look at STEERS events?

02:21:40

4 **A** Just whenever it corresponded with an experience that I had  
5 had. Typically, I would check within the first 24 hours after  
6 an experience, and I typically wouldn't find anything. Two,  
7 three days later, I would find something, sometimes a little bit  
8 later but typically within the first two, three days.

02:21:59

9 **Q** You're saying within the first two or three days you would  
10 find it posted on the actual website?

11 **A** Correct.

12 **Q** And over what period of time would you say you would check  
13 the TCEQ website to look for STEERS reports?

02:22:15

14 **A** From, say, if the event was on a Monday night, from Tuesday  
15 through until I would find it.

16 **Q** I asked the question poorly. What I mean is over what --  
17 you know, months, years, when would you do -- over what period  
18 of time in your time in Baytown would you -- have you checked  
19 the STEERS database?

02:22:32

20 **A** From the first few months of working at Air Alliance  
21 Houston when I first found out about the website and the STEERS  
22 reports through till probably within the last few months that I  
23 lived there.

24 **Q** And what is your understanding of what a STEERS Report is?

02:22:54

25 **A** My understanding of a STEERS Report is when the facility



Cottar - Direct/Kratka

1 itself reports an emissions event that goes above and beyond  
2 their permitted emissions.

02:23:14

3 **Q** And can you estimate on how many occasions you were able to  
4 match a particular incident that you experienced with a report  
5 that you found on the TCEQ STEERS database?

6 **A** I would estimate probably half a dozen.

7 **Q** And how -- you said that you could see flares and see  
8 flaring from your townhouse?

9 **A** Correct.

02:23:29

10 **Q** How frequently would you say you saw flaring events at the  
11 Baytown Complex during the time you lived on Briar Court?

12 **A** I would say on average once a week. You know, there may be  
13 a week where I didn't see an event or experience some sort of  
14 flaring event; but I would say easily within a four-week span, I  
15 would see three or four events.

02:23:55

16 **Q** Can you describe a little more -- in a little more detail  
17 when you say you saw a flaring event. Exactly what was it that  
18 you saw that you considered to be a flaring event?

02:24:13

19 **A** There are typically flares burning -- you know, when I use  
20 the words within reason I mean, you know, they're small.  
21 There's no black plume coming out. They're not audibly  
22 disruptive. Those kinds of things happen, and as I understand  
23 it, that's a good thing. What I refer to as a flaring event is  
24 when either it is audibly disruptive or the black plume is  
25 something that is continuing on end for, you know, an hour or

02:24:36

Cottar - Direct/Kratka

1 more.

2 **Q** And when you refer to a black plume, are you referring to  
3 black smoke?

4 **A** Correct.

02:24:46 5 **Q** And would that be smoke coming from the flare or the --

6 **A** From the flare.

7 **Q** From the flare?

8 **A** Yes, sir.

9 **Q** Can you describe the size of the flames when you would see  
02:24:56 10 something that you considered to be a flaring event?

11 **A** I don't know that I could estimate the size of the flame  
12 other than to say it's relative to, say, the size of the stack  
13 itself.

14 **Q** You mean the elevated structure on which the flare sits?

02:25:12 15 **A** Correct. There were times when the flare may be an eighth  
16 to a quarter of the stack itself, the elevated structure. There  
17 were times when it was much greater than that, and those were  
18 the times that were, obviously, of greater concern.

19 **Q** Are you comparing the length of the flame to the height of  
02:25:38 20 the structure?

21 **A** The length, correct.

22 **Q** And so when you say it was a quarter or a half of the  
23 structure, you don't mean it was overlapping and it went above  
24 the structure?

02:25:49 25 **A** Correct.

Cottar - Direct/Kratka

1 MR. RICE: Objection. Leading.

2 THE COURT: Overruled. Technically, it's leading, but  
3 I'll give him a little leeway.

4 MR. KRATKA: Thank you, your Honor.

02:25:58 5 BY MR. KRATKA:

6 Q And when you say you saw black plumes along with flaring  
7 events, did you always see a black plume along --

8 A Not always.

9 Q About how -- if you could estimate, what percentage of the  
02:26:06 10 time that you witnessed what you considered to be a flaring  
11 event would you also see a black plume of smoke?

12 A I would say probably every two to three months at least.

13 Q And could you -- can you recall for what length of times  
14 these plumes of smoke would come from -- would continue from a  
02:26:30 15 flaring -- a single flaring event?

16 A I've seen it go from a few minutes to several hours.

17 Q In a single event?

18 A In a single event, yes, sir.

19 Q Did you ever record with photographs or video any flaring  
02:26:48 20 events?

21 A I did. I photographed one flaring event one day going back  
22 and forth from taking my kids to and from school and I videoed a  
23 number of flaring events.

24 Q I'm going to show you what has been offered into evidence  
02:27:04 25 as Plaintiffs' 398 which is a short video.

Cottar - Direct/Kratka

1 MR. KRATKA: We'll play the video. Your Honor, the  
2 clip is maybe a minute and a half.

3 THE COURT: Okay.

4 MR. KRATKA: We'll play the clip, and I'll ask you  
02:27:17 5 some questions about it.

6 THE WITNESS: Sure.

7 MR. RICE: Your Honor, at this time I'm going to  
8 object to the admission of these videos on a couple of grounds.  
9 One, they are replete with hearsay.

02:27:26 10 THE COURT: Why is it hearsay?

11 MR. RICE: Well, on several -- I don't know what  
12 portions of the videos that Mr. Kratka is going to show, but in  
13 several instances in the video there are voices coming from off  
14 camera that are purporting to describe what's going on. That's  
02:27:39 15 clearly hearsay. There's opinion testimony in these videos that  
16 lack foundation, and there's also speculation by the witness  
17 himself.

18 THE COURT: Response?

19 MR. KRATKA: First of all, I plan on showing two short  
02:27:54 20 clips. The first clip does have some narration by Mr. Cottar,  
21 but I intend to ask him afterwards to explain here in court  
22 through testimony what it was that he was experiencing and  
23 seeing. And the second clip, I believe, is about a 25-second  
24 clip that has no narration or, perhaps, a word or two.

02:28:15 25 THE COURT: Sustained as to the narration on the first

Cottar - Direct/Kratka

1 one, but he can narrate it as it goes along and overruled as to  
2 the second.

3 MR. KRATKA: Do you want that first one played with  
4 the sound off then?

02:28:25 5 THE COURT: Off.

6 MR. KRATKA: Can we switch the monitor to video as  
7 opposed to the ELMO or to the --

8 THE COURT: The computer?

9 MS. MARY ROCK: Uh-huh.

02:28:56 10 MR. KRATKA: 398 is the Plaintiffs' exhibit of this  
11 video.

12 THE COURT: Is that your computer or not?

13 MS. GOVERN: That is not my computer.

14 THE COURT: Hang on. It's the other one.

02:29:32 15 MR. KRATKA: Could you pause it for a second?

16 Would you like Mr. Cottar narrating as he's going  
17 or --

18 THE COURT: It's up to you. Whatever you want. I  
19 don't mind him narrating as it goes along.

02:29:44 20 (Plaintiffs' Exhibit Number 398 played in open court.)

21 THE WITNESS: I had been awakened probably 15 minutes  
22 prior to this by a loud rambling noise in my bedroom. I grabbed  
23 my phone so I could verify the date and time. It was 5:41 in  
24 the morning and at this point I'm still inside the house about  
02:30:02 25 to walk out.

Cottar - Direct/Kratka

1 THE COURT: What year is it?

2 THE WITNESS: 2011.

3 THE COURT: Okay.

4 THE WITNESS: We can go from there. So I was

02:30:08 5 recording.

6 THE COURT: Let's wait until it begins.

7 THE WITNESS: I'm sorry?

8 THE COURT: Wait until it begins.

9 THE WITNESS: It's going. I'm walking to the door.

02:30:17 10 THE COURT: Okay.

11 THE WITNESS: I'm walking to the door, and there's no  
12 audible sound. And then I open the door, and you can hear the  
13 rumbling.

14 THE COURT: All right. Rumbling. That's the

02:30:29 15 background. What's next?

16 THE WITNESS: I walk from there to where you could see  
17 the flares better. It sounds like a jet engine.

18 THE COURT: That light, what is that light?

19 THE WITNESS: That light is a street light. What you  
02:30:38 20 see silhouetted are the town homes and then that glowing behind  
21 it is the flare that I'm going to walk around toward.

22 BY MR. KRATKA:

23 Q This is -- the sun hasn't come up yet?

24 A Correct.

02:30:48 25 THE COURT: By the way, just -- the narration is not

Cottar - Direct/Kratka

1 anything extraneous, but I'm allowing him -- if you have one  
2 with no narration with the sound, but I assume that it's really  
3 loud.

02:31:04

4 THE WITNESS: Yes, sir. It's the loudness that woke  
5 me up.

6 THE COURT: Okay. Is this outside your house?

7 THE WITNESS: Correct. Walking down the driveway to  
8 where you can see the flaring. You could kind of see it through  
9 the trees there, and there you see both flare stacks.

02:31:22

10 THE COURT: There are two in there?

11 THE WITNESS: Correct.

12 THE COURT: Oh, yeah, there's the second one.

13 THE WITNESS: And I don't think I'm saying anything at  
14 that point. It's just rumbling.

02:31:45

15 MR. KRATKA: I'll just ask some questions as this is  
16 playing.

17 THE COURT: Now, if you want to put the sound on with  
18 the rumbling, that's fine. Do you want to try it?

19 MR. KRATKA: That's okay. We've got the testimony on  
20 that.

02:31:57

21 BY MR. KRATKA:

22 **Q** Now, the -- on the image it looks like two very, very  
23 bright headlights. Is that the way the flares looked to you  
24 when you were actually watching?

02:32:07

25 **A** No, sir. That's the distortion of the camera. They were

Cottar - Direct/Kratka

1 just very large flames.

2 **Q** And at this time you said you were awakened by the noise?

3 **A** By the noise.

4 **Q** And was there any -- did you experience any odors at this  
02:32:21 5 time?

6 **A** I didn't on this one until I opened the door. And then I  
7 opened the door and I got hit with that same very sweet odor.

8 **Q** All right. Now after this event, did you attempt to  
9 consult the STEERS database?

02:32:36 10 **A** I did. Took a couple of days for it to show up the next  
11 morning or later that day -- you know, it was already morning at  
12 that point. Later that day, I checked the website. There was  
13 nothing. Checked the next day and the STEERS Report had been  
14 filed and it directly corresponded to this time frame. It  
02:32:55 15 actually had started, I believe, about an hour earlier, went for  
16 a couple of hours after this.

17 THE COURT: That flame and the noise?

18 THE WITNESS: Yes, sir.

19 BY MR. KRATKA:

02:33:05 20 **Q** I'm going to show you -- I'm going to hand you a copy of  
21 Plaintiffs' -- an excerpt from Plaintiffs' Exhibit 17 which --

22 THE COURT: By the way, I assume that everybody is  
23 making notes or somebody is on each side of the exhibits as  
24 they're identified. Okay.

02:33:24 25 MR. KRATKA: Yes. Plaintiffs' Exhibit 17, your Honor,



Cottar - Direct/Kratka

1 is a compendium of STEERS reports relating to STEERS events at  
2 the olefins plant.

3 THE COURT: Including this one?

4 MR. KRATKA: Including this one.

02:33:39 5 THE COURT: Any -- well, we don't -- it's in. Let's  
6 keep moving. If it's something you have a problem, get with me.  
7 Okay.

8  
9 MR. KRATKA: I'm going to hand the witness a copy of  
02:33:49 10 Plaintiffs' Exhibit 17 and, your Honor, I also put it up on the  
11 screen. We can switch.

12 THE COURT: Oh, yeah, hang on.

13 BY MR. KRATKA:

14 Q And, Mr. Cottar, is this -- can you identify what this  
02:34:23 15 document is?

16 A This is a STEERS Report from the event that I videotaped.

17 Q How do you know it's the event you videotaped?

18 A The date and time match up, and the location matches up,  
19 the date and time where it shows the event beginning in that  
02:34:38 20 quadrant there and the event ending with the time and date stamp  
21 and with the fact that below that it specifies that it was the  
22 Baytown olefins plant, the primary flare on that first page and  
23 the secondary flare on the second page.

24 Q And can you tell what pollutants were emitted during this  
02:35:03 25 event?

Cottar - Direct/Kratka

1 **A** Butane, carbon monoxide, butene, ethylene, iso-butane,  
2 iso-butene, NOx, propane, propylene and trans-2-butene.

3 **Q** And the STEERS Report also lists the amount of each  
4 pollutant?

02:35:40

5 **A** Correct.

6 **Q** In the far right-hand column?

7 **A** Right. For instance, the carbon monoxide is 1800 pounds.  
8 The ethylene is over a thousand pounds.

9 **Q** That's from one flare?

02:35:54

10 **A** Correct.

11 THE COURT: When they say "pounds" in gas, is that  
12 what the liquified product would be?

13 MR. KRATKA: There's a way -- I believe, your Honor,  
14 there's a way of measuring the poundage of actual --

02:36:05

15 THE COURT: What is that poundage, in other words, in  
16 real pounds?

17 MR. KRATKA: I think those are real pounds.

18 THE COURT: Okay.

19 MR. KRATKA: We'll have an expert witness and I'm sure  
20 the other side will as well who can explain exactly how that is  
21 calculated.

02:36:15

22 BY MR. KRATKA:

23 **Q** And then from the second flare, there were also additional  
24 emissions?

02:36:26

25 **A** Correct. Over 1400 pounds of carbon monoxide on that

Cottar - Direct/Kratka

1 secondary flare and over 800 pounds of the ethylene.

2 **Q** Thank you. And I want to draw your attention to, if you  
3 can recall, back to September of 2011, later that year.

4 **A** Sure.

02:36:51 5 **Q** Do you recall another air incident happening in September?

6 **A** I do. There was an incident where I was working from home  
7 that day. I believe it was a Friday, but it may not have been.  
8 And my office at home faced our mailbox, and I saw the mail  
9 truck come by. So I went out to get the mail. It was about  
02:37:17 10 9:00 o'clock in the morning, and it was the strongest odor I've  
11 ever smelled in my life. And I don't mean to speak  
12 hyperbolically. It really, truly was the strongest experience  
13 like this from an olfactory perspective. When I opened the  
14 door, it just immediately hit me. And so I went and I got the  
02:37:38 15 mail and I came back.

16 **Q** Just to break in, can you describe what the odor was?

17 **A** Again, it's that really strong, sweet, kind of painful odor  
18 that hurts.

19 THE COURT: What does that mean?

02:37:51 20 THE WITNESS: Have you ever had a smell that hurts  
21 right in the middle of your head when you smell it. I don't  
22 know any other way to describe that. I'm sorry.

23 THE COURT: Okay. Go on.

24 BY MR. KRATKA:

02:38:01 25 **Q** I guess I would ask: Did it -- are you saying that

Cottar - Direct/Kratka

1 breathing it caused pain?

2 **A** Yes. I didn't have the pain before I opened the door, and  
3 then once I closed the door and sort of cleared out my system,  
4 the pain did go away.

02:38:16 5 **Q** So what else happened that morning?

6 **A** First thing I did like every time, called the CAER line.  
7 Like every time, I hadn't heard anything on the CAER line.  
8 There was nothing called in at least at that point. I called  
9 TCEQ to find out if they knew anything and to also file a  
02:38:37 10 report.

11 THE COURT: Are there any emergency procedures at  
12 Baytown or the plant have maybe some danger --

13 THE WITNESS: Your Honor, I don't know. I've tried to  
14 find that out on several occasions. And I simply don't know.

02:38:51 15 THE COURT: So there's no warning or loud speakers?

16 THE WITNESS: There is -- there is a very loud alarm  
17 that I have heard.

18 THE COURT: What's it sound like?

19 THE WITNESS: Like an air-raid siren, but I have no  
02:39:04 20 idea what that means.

21 THE COURT: Okay.

22 BY MR. KRATKA:

23 **Q** So continuing on, you were talking about attempting to call  
24 the TCEQ?

02:39:13 25 **A** The TCEQ. That particular morning when I called,

Cottar - Direct/Kratka

1 apparently all the investigators were out of the office and  
2 there wasn't even an investigator or anybody that I could leave  
3 a message with and sort of log a complaint or a question. All I  
4 found was a receptionist who said she would call me whenever an  
5 investigator came back in.

02:39:32

6 I made several calls throughout the day. The  
7 event itself lasted well into the afternoon, early evening time.  
8 I never heard back from a TCEQ investigator on that day, never  
9 had anyone call me back. I made multiple calls.

02:39:50

10 **Q** Did you experience any other symptoms that day?

11 **A** Only when I went outside. So I stayed inside.

12 **Q** And did you subsequently attempt to check the STEERS  
13 database?

14 **A** I did.

02:40:01

15 **Q** And what did you discover?

16 **A** I found a corresponding event report similar to this one  
17 that was again about an hour earlier that day, 8:00 something  
18 that went through about 6:00 p.m.

02:40:25

19 **Q** I'm going to show you another STEERS Report drawn from  
20 Plaintiffs' Exhibit 17 which is also -- I should say that both  
21 of these STEERS reports are reflected on the stipulated summary  
22 Table 2C, Plaintiffs' Exhibit 2C.

23 Can you identify this document for the Court?

02:40:50

24 **A** Yes, sir. It's the STEERS Report corresponding to -- it  
25 looks like that same -- that same day.

1 Q Is that the right day and time?

2 A It is the right day but the time seems to be off.

3 Q How so?

4 A Well, it definitely went on until late in the afternoon,  
02:41:04 5 and this is showing an event that only lasted about an hour  
6 unless I'm misreading it.

7 Q I think you're reading it correctly?

8 A Okay.

9 Q And can you identify which pollutants were reported as  
02:41:20 10 being emitted in this event?

11 A Let's see. Almost 700 pounds -- 697 pounds of propylene,  
12 100 pounds of ethylene, and then smaller recorded amounts of  
13 butene, butadiene, butane -- no, butene, again, CL --  
14 CIS-2-butene.

02:41:49 15 Q And the emission limit is listed as what?

16 A Not specifically authorized.

17 Q And the limit is listed as zero?

18 A Correct.

19 Q And drawing your attention now to a little later, to May of  
02:42:13 20 2012, do you recall any air quality incidents occurring during  
21 that time?

22 A Yes, sir, and it was a turning point for me.

23 Q All right. Before we get into the turning point aspect of  
24 it, this is when I would like to show another short video clip.  
02:42:27 25 This will be Plaintiffs' Exhibit 401.

Cottar - Direct/Kratka

1 THE COURT: Are you going to show that off, what, the  
2 computer system?

3 MR. KRATKA: Yes, if we could.

4 THE COURT: What time was this?

02:42:49 5 THE WITNESS: Approximately 9:30, 9:45 in the evening.

6 MR. KRATKA: Could you pause it there, Mary?

7 BY MR. KRATKA:

8 Q And what was that sound in the background?

9 A That was that siren.

02:43:02 10 THE COURT: That was the siren going off?

11 THE WITNESS: (Indicated yes.)

12 THE COURT: Who runs that siren? Anybody know?

13 Anybody know who runs the siren?

14 MR. RICE: Your Honor, it's Exxon siren.

02:43:17 15 THE COURT: Okay. It's in-house rather than the city  
16 itself.

17 MR. RICE: Your Honor, I think you'll hear testimony  
18 later in the --

19 THE COURT: That's okay. That's all I needed to know.

02:43:26 20 Go on.

21 BY MR. KRATKA:

22 Q Can you describe what's being looked at there, what's being  
23 shown, those two bright lights?

24 A Two very large flares. Again, the picture kind of distorts  
02:43:36 25 the scope and size of it.

Cottar - Direct/Kratka

1 Q And can you describe what's above the flare?

2 A Above the flaring, you can see -- it's easier to see when  
3 the video is in motion, but there's two very large black plumes  
4 of smoke. In reality again the distortion of the camera kind of  
02:43:52 5 makes it look whiter than it is, but it was definitely not  
6 steam. It was definitely black soot.

7 THE COURT: How long is the video?

8 MR. KRATKA: Just a few more seconds.

9 THE COURT: Yeah, I know. In other words, I'd like to

02:44:05 10 hear it again. Let me hear it again.

11 MS. MARY ROCK: Start it over?

12 THE COURT: Yes, please.

13 MR. KRATKA: Just rewind it.

14 THE COURT: Turn the sound up, please.

02:44:22 15 (Video played in open court.)

16 BY MR. KRATKA:

17 Q And did you take this video?

18 A I did.

19 Q Did you also take additional video footage that evening?

02:44:50 20 A I took a lot of footage that night.

21 Q Why did you take make a video of this event?

22 A Because honestly I had no idea what was going on. I was --  
23 I was scared. I was trying to get answers. I called the CAER  
24 line again. Nothing was recorded on the CAER line. I --  
02:45:09 25 actually I called 911 and spoke to a 911 operator to find out if



Cottar - Direct/Kratka

1 they knew what was going on. And the 911 operator told me that  
2 they didn't know and that they didn't need to know, that Exxon  
3 had its own emergency service -- its own emergency response  
4 services and that they didn't communicate with the City as to  
5 the emergencies that were going on. I called the only public  
6 number at the Baytown facility which rang to a security booth,  
7 and the security person at the booth told me that it was --

02:45:29

8 MR. RICE: Your Honor, I'm going to object to the  
9 hearsay testimony. This is precisely --

02:45:47

10 THE COURT: Sustained.

11 BY MR. KRATKA:

12 Q If you can describe what happened without including  
13 specific things --

14 THE COURT: After you made that call, what, if  
15 anything, did you do?

02:45:54

16 THE WITNESS: I made other calls. I won't -- I guess  
17 I can't go into the details of what those calls were, but I made  
18 other calls.

19 THE COURT: To who, not what they said, to who.

02:46:07

20 THE WITNESS: I called the -- I called 911. I called  
21 the front office.

22 BY MR. KRATKA:

23 Q Of Exxon?

24 THE WITNESS: The security booth. Someone finally at  
25 the security booth gave me a number inside the facility to speak

02:46:22

Cottar - Direct/Kratka

1 to someone in that unit. I called that number on several  
2 occasions in succession of about five minutes and every time --  
3 the first time I called, I asked what was going on, and they  
4 hung up. And then every time I called after that, they picked  
5 it up and hung up immediately.

02:46:43

6 Q How many times did that happen would you say?

7 A Five or six.

8 Q And how long did this event continue that night?

9 A It began around 9:15, 9:30. I can honestly say that I know  
10 that it went until 12:45 or 1:00 a.m. that night because I was  
11 writing all of this, trying to document everything every step of  
12 the way. And I do remember stating at about 1:00 a.m. that it's  
13 still going on. How long after that I don't remember.

02:47:03

14 Q So you did make a written description?

02:47:23

15 A I did make a written description.

16 Q Did you make it at that time?

17 A I did make it at the time.

18 Q While the event was still going on?

19 A Yes, sir.

02:47:30

20 Q I'm going to show you a copy of Plaintiffs' Exhibit 399.

21 MR. RICE: Your Honor, I'm going to object to 399 as  
22 well on the same hearsay grounds.

23 THE COURT: Let him take a look at it, but don't say  
24 anything about it. Just take a look at it.

02:48:11

25 BY MR. KRATKA:

Cottar - Direct/Kratka

1 Q Can you identify what that --

2 THE COURT: No, no. Just look at it and refresh your  
3 recollection.

4 THE WITNESS: Okay.

02:48:18 5 MR. KRATKA: In response to the hearsay objection,  
6 your Honor.

7 THE COURT: What is it?

8 BY MR. KRATKA:

9 Q Can you identify that the exhibit is?

02:48:22 10 A It's an e-mail that I was writing at 1:50 a.m.

11 Q Had you started writing earlier than that?

12 A I had.

13 THE COURT: Who did you send it to?

14 THE WITNESS: I sent it to some colleagues I worked  
02:48:39 15 with and to Mr. Kratka.

16 MR. KRATKA: Your Honor, I would argue at this time  
17 this qualifies for the hearsay exception as contemporaneous --  
18 present sense impression of the event. He recorded it at the  
19 time the event was happening.

02:48:53 20 THE COURT: In writing in an e-mail, correct?

21 MR. KRATKA: Correct.

22 THE COURT: All right. I'm not being overly academic.  
23 You got a case on that one?

24 MR. KRATKA: We can find one. I don't have it right  
02:49:04 25 now.

Cottar - Direct/Kratka

1 THE COURT: All right. At this time sustain the  
2 objection. If you can find something let in something like that  
3 as a contemporaneous comment, I'll take a look at it again.

4 MR. KRATKA: Thank you, your Honor. Let me just --

02:49:20

5 THE COURT: By the way, when I say "case," it doesn't  
6 have to be a Fifth Circuit case, anything ever on anything. You  
7 don't have Fifth Circuit, anything serves as guidance and would  
8 be helpful. Go right ahead.

9 BY MR. KRATKA:

02:49:32

10 Q And again did you attempt to consult the STEERS database  
11 after this event?

12 A I did.

13 Q And what was the result of that search?

02:49:46

14 A It actually coincided with information that I gained that  
15 night from another encounter with a different employee.

16 Q We're not going to get into statements that you were told  
17 by another --

18 A Sorry.

02:49:58

19 Q -- Exxon employee, but I'm going to show you another STEERS  
20 event from Plaintiffs' Exhibit 17 and which is also reflected in  
21 the stipulated table in Plaintiffs' Exhibit 2C and ask you if  
22 you can identify this.

23 A Okay.

24 Q Can you identify this document?

02:50:26

25 A Yes, sir.

Cottar - Direct/Kratka

1 Q What is it?

2 A It's another STEERS Report, and this one coincides with the  
3 event that I described just a second ago.

4 MR. KRATKA: Your Honor, if you want to look at this,  
02:50:37 5 I can put it back on the --

6 THE COURT: No just stretching, that's all.

7 MR. KRATKA: No, no. I was asking if you could switch  
8 back to the ELMO.

9 THE COURT: Oh, okay. Sure. I'm sorry.

02:50:54 10 MR. KRATKA: Don't want to interrupt the stretch.

11 THE COURT: Hang on a second. Off the record.

12 (Discussion off the record.)

13 BY MR. KRATKA:

14 Q And, Mr. Cottar, is this the STEERS event that you found  
02:51:28 15 that was associated with the event?

16 A Yes.

17 Q What was the date and time of this event?

18 A May 22, 2012 at 9:35 p.m. through May the 23, 2012, at 3:35  
19 a.m.

02:51:48 20 Q Flipping to the second page, again, were there olefin plant  
21 flares involved in this event?

22 A Yes, sir.

23 Q And those are the flares that you believe you observed and  
24 videotaped?

02:51:57 25 A Yes, sir.

Cottar - Direct/Kratka

1 Q And there were again a number of different pollutants were  
2 emitted during this event?

3 A Correct.

4 Q And did you detect any odors during that night?

02:52:09 5 A Very, very strong odors.

6 Q You said that you had received information by speaking with  
7 an Exxon employee that evening?

8 A Yes, sir.

9 MR. RICE: Objection, your Honor. First it  
02:52:28 10 mischaracterizes his evidence. I don't think he testified to  
11 that.

12 THE COURT: I can't hear you.

13 MR. RICE: I also raise my hearsay objection to any  
14 testimony that he gives as to what some purported ExxonMobil  
02:52:41 15 employee told him that night.

16 THE COURT: What's your response?

17 MR. KRATKA: That it is an admission of a party  
18 opponent and, therefore, not hearsay.

19 MR. RICE: Your Honor, it's not an admission of a  
02:52:50 20 party opponent because they haven't identified who this  
21 purported Exxon employee is, and if he's not a member of  
22 administration or an executive member of Exxon, he doesn't speak  
23 for Exxon.

24 THE COURT: A little more predicate.

02:53:04 25 BY MR. KRATKA:

1 Q Can you describe how you encountered this person who  
2 provided information?

3 A Sure. When I -- I said earlier that -- I called the  
4 security booth. When I finally realized that I -- I didn't feel  
02:53:21 5 like I was getting enough information for the safety of my  
6 family. I got in my car, and I drove over -- again, I'm just  
7 across the street. I drove over there to find out, and on the  
8 big U-turn that you have to make, I realized that the security  
9 booth was Exxon Chemical and that when -- the stacks were  
02:53:48 10 Baytown Olefin plant because as I made that U-turn, there were  
11 dozens, hundreds, I don't know, dozens -- I'll stick with  
12 dozens -- of cars quickly exiting the plant. That further  
13 alarmed me. And I just simply stopped in front of one of the  
14 cars and asked the guy. I said, What's going on.

02:54:11 15 THE COURT: Okay. Hold it.

16 BY MR. KRATKA:

17 Q Did the person identify himself?

18 A He did.

19 Q And what did he -- who did he -- how did he describe who he  
02:54:19 20 was?

21 A He didn't give a name. I didn't ask for a name. And I  
22 won't even describe what he said. That's just how -- he was  
23 coming out of the parking lot. He did describe himself as an  
24 employee, and I asked, you know, "Is everything okay? What do I  
02:54:33 25 need be doing? This is scaring me." And that -- and so -- so

Cottar - Direct/Kratka

1 he responded.

2 MR. RICE: Your Honor --

3 THE COURT: We haven't heard yet. We're not there  
4 yet.

02:54:45 5 Sir, if you see the other lawyer get up, don't  
6 answer the question.

7 THE WITNESS: Okay.

8 THE COURT: Go right ahead.

9 BY MR. KRATKA:

02:54:51 10 Q Did he identify himself as an Exxon employee?

11 A Yes, sir.

12 Q And did he say what position he held at Exxon?

13 A No, sir.

14 Q Did he describe what his job was in any way at Exxon?

02:55:04 15 A No, sir.

16 Q Well, what did he say to you?

17 MR. RICE: I have to object at this time.

18 THE COURT: Sustained.

19 MR. KRATKA: All right. We'll move on.

02:55:16 20 BY MR. KRATKA:

21 Q Did you -- did this emission event, this experience that  
22 night, concern you in any way?

23 A Yes, sir, enough that we moved.

24 Q You earlier described this emission event as a turning  
02:55:34 25 point?



Cottar - Direct/Kratka

1 **A** Yes, sir.

2 **Q** Can you explain what you mean by that?

3 **A** Well, when I look at the STEERS Report here, 4,000 pounds  
4 of carbon monoxide 20 -- and that's, you know, again the  
02:55:48 5 permitted limit, according to the STEERS Report, is 531 and  
6 we're talking about 4,000 pounds. Almost 3,000 pounds of  
7 ethylene which is heavier than air.

8 That to me coupled with the fact that -- to me  
9 it's not so much the emissions. I understand that -- that  
02:56:13 10 facilities like these are going to have problems. Problems are  
11 understandable. No communication, no idea of how to understand  
12 what's safe or what's not, what is truly harmful or things I  
13 should run from, trying to call and make contact with every  
14 conceivable place that I can think of to get that information  
02:56:36 15 and getting no response, that's not worth my family anymore.

16 **Q** So you decided to move at that point?

17 **A** So we decided to move.

18 THE COURT: Where did you move?

19 THE WITNESS: To the 1008 Wright Boulevard home that  
02:56:48 20 we bought about six months later.

21 THE COURT: That's the second one that you pointed  
22 out?

23 THE WITNESS: Yes, sir.

24 THE COURT: And that you say is, what, about two miles  
02:56:56 25 from the plant?

Cottar - Direct/Kratka

1 THE WITNESS: About two miles.

2 BY MR. KRATKA:

3 Q Let me ask you about some health issues. You said you have  
4 children?

02:57:05 5 A Yes, sir.

6 Q And how old are your children now?

7 A Now eight, ten, and 14.

8 Q And do you personally have -- have you had any health  
9 issues while living in Baytown?

02:57:18 10 A I've had asthma most of my life.

11 Q And what about your family members, have they?

12 A My wife --

13 MR. RICE: Objection, your Honor. I'm going to object  
14 to the testimony about extended family member's health. It's  
02:57:32 15 irrelevant. First of all, it's -- it's irrelevant to the claims  
16 in this case.

17 THE COURT: Where is it irrelevant to the claims in  
18 the case?

19 MR. RICE: Because they're not standing members in the  
02:57:42 20 organizations that are suing Exxon. Mr. Cottar is a standing  
21 member; and if he wants to ask Mr. Cottar about his health  
22 problems that he attributes to Exxon, I certainly think that's  
23 relevant to the case; but anybody outside of Mr. Cottar is not  
24 relevant to the case.

02:57:58 25 THE COURT: What's your response, please?

Cottar - Direct/Kratka

1 MR. KRATKA: Response is that to the extent that  
2 health impacts on his family personally impact Mr. Cottar,  
3 they're certainly relevant.

4 THE COURT: I'll use it -- I'm going to allow it in  
02:58:10 5 for a limited purpose, to show the reason why he moved, his  
6 reason that he moved. Beyond that I understand it, and I'm not  
7 going to -- I understand that we're going to look at medical  
8 testimony later on linking up and so forth. So at this point  
9 for that limited purpose as to why he took certain actions, I'll  
02:58:29 10 allow it in for that limited purpose. Now, if it was a jury --  
11 if it was a jury case, it might be different. Okay. Go on.  
12 The ruling might be different out of an abundance of caution to  
13 a jury. Go right ahead.

14 BY MR. KRATKA:

02:58:45 15 Q Mr. Cottar, is your -- I'm sorry. I don't know if you got  
16 to complete your answer as to --

17 THE COURT: You say your children and spouse have some  
18 problems, health problems; is that correct.

19 THE WITNESS: Correct. Two of my kids have asthma.  
02:58:57 20 My wife has asthma. I have asthma.

21 BY MR. KRATKA:

22 Q And where is your wife from?

23 A Baytown.

24 Q Born and raised in Baytown?

02:59:07 25 A Yes, sir.

Cottar - Direct/Kratka

1 Q And your children have always lived in Baytown?

2 A Yes, sir.

3 Q Do your health issues, your asthma, and do the health  
4 issues you've described with your family play any role in your  
02:59:26 5 concern about emissions from the Baytown Complex?

6 THE COURT: That's a yes or no.

7 THE WITNESS: Can you restate that again?

8 THE COURT: Do you want it read back?

9 THE WITNESS: Sure.

02:59:37 10 THE COURT: Gayle, please.

11 (The last question was read.)

12 THE WITNESS: Yes.

13 BY MR. KRATKA:

14 Q And what role do they play?

02:59:53 15 A I certainly can't say that there's a causal role. I will  
16 say that there's definitely --

17 THE COURT: Now you're objecting?

18 MR. RICE: No. No, sir.

19 THE COURT: Okay. That's the beauty of a non-jury  
03:00:06 20 case. Go right ahead. You may answer the question.

21 THE WITNESS: I can't say that there's a causal role,  
22 but I have noticed a corollary relationship at least in that --  
23 living in that town home right across the street, we have a  
24 nebulizer with a lot of albuterol for our health issues for the  
03:00:30 25 asthma. When we lived there, we were using that nebulizer

Cottar - Direct/Kratka

1 almost on a monthly basis. Someone in the family was that bad  
2 off that they were using that. A year and half later, we've  
3 moved, and it's never come out of the packing box.

03:00:49

4 THE COURT: You're talking about a nebulizer. Is that  
5 an individual inhaler or something that mists in the air?

6 THE WITNESS: It's sort of the gas mask looking  
7 inhaler.

8 THE COURT: Okay.

9 BY MR. KRATKA:

03:01:01

10 **Q** The fact of your own asthma, whether or not you're  
11 attributing your asthma to Exxon, does the fact that you have  
12 asthma play any role in your own concern about your own exposure  
13 to air emissions?

14 **A** Yes.

03:01:16

15 **Q** What role does it play?

16 **A** Again just going by the location and my own experiences, it  
17 seems to me that every time there was one of these events that  
18 had that pungent odor there was some sort of asthma-related  
19 reaction. It -- to me it seems to exacerbate the issue for us.

03:01:51

20 **Q** Do you know whether or not Exxon emits any -- based on your  
21 review of STEERS reports, whether or not Exxon emits any  
22 pollutants that are capable of causing cancer?

23 **A** Yes.

03:02:06

24 MR. RICE: Objection. Your Honor, speculation, first  
25 of all; lacks foundation.

Cottar - Direct/Kratka

1 THE COURT: Read it back. I'll listen. Let me hear  
2 it one more time.

3 (The last question was read.)

4 THE COURT: Sustain the objection.

03:02:39

5 BY MR. KRATKA:

6 Q Mr. Cottar, do you know whether or not benzene is a human  
7 carcinogen?

8 MR. RICE: Same objection, your Honor.

9 THE COURT: Sustain the objection.

03:02:55

10 Based upon what you know, you were really  
11 concerned and still are, correct?

12 THE WITNESS: Yes, sir.

13 BY MR. KRATKA:

03:03:05

14 Q Mr. Cottar, what do you and your family do for recreation  
15 in Baytown? Do you ever spend time outdoors?

16 A We do. There is --

17 THE COURT: Yes. Next question. A lot easier as far  
18 as getting your points out. If you want to ask him to describe,  
19 that calls for a narrative.

03:03:18

20 BY MR. KRATKA:

21 Q Would you describe what your outdoor recreational  
22 activities are with your family in Baytown?

23 A Sure. There are about three different places that we like  
24 to spend time at outdoors. One is a park close to where we live  
25 now, Roseland Park. Then there are two different Baytown nature

03:03:35

Cottar - Direct/Kratka

1 facilities. One is the Eddie Gray Wetlands Facility and the  
2 other one, I believe, is just called the Baytown Nature Center,  
3 I believe, is the actual name, the Baytown Nature Center.

03:04:05

4 **Q** Can you point out the location of these centers on the  
5 Baytown map?

6 **A** Yes. It may take me a minute to orient myself. The  
7 Baytown Nature Center is approximately right in here and the --

03:04:23

8 **MR. KRATKA:** Just let the record reflect that the  
9 witness is pointing to a location just to the west of the  
10 Baytown Complex.

11 **THE WITNESS:** And the wetlands center, I believe, is  
12 right around here.

13 **THE COURT:** Where is the water? Wetlands center, is  
14 that stream below, coming in below?

03:04:40

15 **THE WITNESS:** I believe it's Goose Creek, yes, sir.

16 **BY MR. KRATKA:**

17 **Q** Mr. Cottar, perhaps you could just circle on the map here  
18 with a pen so the Court has a recollection of where those two  
19 locations are.

03:04:58

20 **A** Right there is the wetlands center.

21 **Q** Just put your initials, R. C. or S. C., next to that.

22 **A** And then approximately right here is the Baytown Nature  
23 Center.

03:05:16

24 **Q** While you're -- while I have you here, why don't you circle  
25 the area where your Briar Court home was.

Cottar - Direct/Kratka

1 THE COURT: Why don't you put like a one and then a  
2 two. The first one is a one and the second one is -- and put a  
3 circle around that. I can't see it. It's a little bit off  
4 the --

03:05:39 5 MR. KRATKA: I'm just going to put his initials next  
6 to this.

7 BY MR. KRATKA:

8 Q That's -- you go by your middle name, Shae Cottar?

9 A Yes.

03:05:47 10 Q So S. C., thank you.

11 Has your use of these outdoor recreational areas  
12 been affected in any way by air quality concerns?

13 A Yes, sir.

14 Q How so?

03:06:07 15 A First of all, on high ozone days with our asthma, we try to  
16 stay indoors, and that can vary from location to location. But  
17 the second thing is, with the Baytown Nature Center, that's  
18 right there next to the fence for ExxonMobil. If there are  
19 emissions events going on, there have been a few times when  
03:06:33 20 we've gone over there, we see an emission event. We just don't  
21 stay.

22 Q And has moving farther away from the Exxon complex now in  
23 your second location, has that eliminated your concerns about  
24 air emissions from the Exxon facility?

03:06:50 25 A No.



Cottar - Direct/Kratka

1 Q Why hasn't it?

2 A Well, number one, it still hasn't eliminated our  
3 experiences. The experiences have grown increasingly more  
4 limited, but it's still a community that I love. My family  
03:07:13 5 lives there. I have extended family that lives there. And I --  
6 you know, I've invested there. I've lived my whole life there.  
7 I've owned property there. And to me these are issues of  
8 investment and issues of community.

9 Q And you understand that Exxon has air operating permits?

03:07:31 10 A Yes, sir.

11 Q And do you understand that those permits allow the company  
12 to emit certain authorized amounts of pollutants into the air?

13 A Yes, sir.

14 Q And do you want to breath any pollutants that are not  
03:07:43 15 authorized by those permits?

16 A No, sir.

17 Q Okay. And if Exxon were to reduce its emissions of  
18 unauthorized pollutants, would that serve to lessen your  
19 concerns any about air quality in Baytown?

03:07:58 20 A Yes, sir.

21 MR. KRATKA: That's all I have for now.

22 THE COURT: Thank you.

23 MR. RICE: May I proceed, your Honor?

24 THE COURT: Yes.

03:08:06 25 //

Cottar - Cross/Rice

1 CROSS EXAMINATION

2 BY MR. RICE:

3 Q Good afternoon, Mr. Cottar?

4 A Hi.

03:08:11 5 Q You also go by the name Shaeman on the Internet?

6 A Yes, sir.

7 Q Is that your blog Shaeman dot-com?

8 A It is.

9 THE COURT: How do you spell it?

03:08:21 10 THE WITNESS: S-h-a-e-m-a-n.

11 BY MR. RICE:

12 Q I want to talk about how you got involved in this lawsuit.

13 A Okay.

14 Q I think that you testified -- first of all, you understand

03:08:30 15 that this lawsuit was filed in December of 2010, right?

16 A Yes, sir.

17 Q Okay.

18 MR. RICE: And, in fact, Judge, can we switch the

19 monitors over to --

03:08:38 20 BY MR. RICE:

21 Q And in December of 2010, you were working for this group

22 Air Alliance Houston, correct?

23 A That's correct.

24 Q And Air Alliance Houston is another environmental advocacy

03:09:13 25 group much like the Plaintiffs in this case; is that correct?

Cottar - Cross/Rice

1 **A** Correct.

2 **Q** And in fact --

3 THE COURT: Blow that up a little bit.

4 MR. RICE: Can you just pull out the top line there?

03:09:31 5 BY MR. RICE:

6 **Q** Isn't it true, sir, that part of Air Alliance Houston's  
7 mission is to, as it says there, reduce air pollution, but  
8 specifically through things such as advocacy, right?

9 **A** Yes, sir.

03:09:43 10 MR. RICE: And, Hien, if you can go to the second  
11 highlighted area, please.

12 BY MR. RICE:

13 **Q** That advocacy involves litigation?

14 **A** Yes, sir.

03:09:56 15 **Q** Litigation to try to further that environmental advocacy  
16 group's goals, right?

17 **A** Yes, sir.

18 MR. RICE: And, Hien, if you'll show us the third  
19 piece of this page, please.

03:10:07 20 BY MR. RICE:

21 **Q** In fact, Air Alliance partners with groups such as  
22 Environment Texas and Sierra Club, Lone Star Chapter, the very  
23 Plaintiffs in this case, do they not?

24 **A** Yes, sir.

03:10:20 25 **Q** Now, as I understand your testimony, you began working for

Cottar - Cross/Rice

1 Air Alliance Houston sometime in the summer of June, 2010. Now,  
2 is it May or June that you started with Air Alliance?

3 **A** I believe it was May.

03:10:39

4 **Q** So, you started with Air Alliance Houston about the same  
5 time that you moved into your house at Briar Court; is that  
6 right?

7 **A** I moved into the house in April.

03:10:53

8 **Q** And it was through your employment with Air Alliance  
9 Houston that you first became familiar with this lawsuit which  
10 at the time was just an impending lawsuit, right?

11 **A** Correct.

12 **Q** Because when you first -- you first joined Air Alliance, it  
13 was your director there, Mr. Tejeda, who got you connected with  
14 Mr. Kratka's firm; is that correct?

03:11:09

15 **A** Correct.

16 **Q** His organization, the National Center for --

17 MR. KRATKA: The National Environmental Law Center.

18 MR. RICE: Thank you very much. The National  
19 Environmental Law Center.

03:11:21

20 BY MR. RICE:

21 **Q** In fact, was Mr. Tejeda -- it was Mr. Tejeda, your  
22 executive director at Air Alliance?

23 **A** Yes, sir.

03:11:32

24 **Q** He told you that there was something going on in Baytown  
25 that you ought to know about? He asked you because he knew you

Cottar - Cross/Rice

1 lived in Baytown, right?

2 **A** He knew of the experiences that I had already had, yes,  
3 sir.

4 **Q** He knew you lived in Baytown?

03:11:40 5 **A** Yes, sir.

6 **Q** Mr. Tejeda, being the executive director of Air Alliance  
7 said, "Hey, you live in Baytown. There's something going on  
8 over there that you need to know about"; isn't that true?

9 MR. KRATKA: Objection, your Honor. He's creating a  
03:11:49 10 dialogue for a conversation he's not a part of.

11 THE COURT: Overruled.

12 THE WITNESS: Could you restate that?

13 MR. RICE: Could you read the question back?

14 THE COURT: I'll tell you what, let's state it again.  
03:11:55 15 It will be a lot quicker.

16 BY MR. RICE:

17 **Q** Mr. Tejeda was the executive director of Air Alliance,  
18 correct?

19 **A** Yes.

03:12:02 20 **Q** You had went to work for Mr. Tejeda as executive director  
21 at Air Alliance, correct?

22 **A** Correct.

23 **Q** He knew you lived in Baytown?

24 **A** Correct.

03:12:10 25 **Q** He came to you and said, "There's something going on in

Cottar - Cross/Rice

1 Baytown that you need to know about"?

2 **A** Correct.

3 **Q** Okay. And then you got in touch with Mr. Kratka's group,  
4 the National Center For Environmental Law, true?

03:12:24 5 **A** Correct.

6 **Q** Now, when you first got in touch with Mr. Kratka's  
7 organization, that was in the late summer, early fall of 2010,  
8 correct?

9 **A** I would say, to the best of my knowledge and memory, it was  
03:12:46 10 probably late fall, not late summer or early fall.

11 **Q** So it was late fall of 2010. And Mr. Kratka's group then  
12 informed you about this lawsuit that they were thinking about  
13 filing, correct?

14 **A** Correct.

03:13:05 15 **Q** And he told you about a press conference they were going to  
16 have?

17 **A** Correct.

18 **Q** He invited you to the press conference?

19 **A** Correct.

03:13:14 20 **Q** You attended that press conference?

21 **A** Correct.

22 **Q** Now -- and the purpose of that press conference was to  
23 announce the filing of this lawsuit; is that -- is that correct?

24 **A** Yes, sir.

03:13:30 25 **Q** And it was just a few weeks before this press conference

Cottar - Cross/Rice

1 that you were told by Mr. Kratka's group that you might be a  
2 witness in this case, that you would be a good witness in this  
3 case?

4 **A** I don't know about the time line.

03:13:42 5 **Q** Now, when did you become a member of the Sierra Club?

6 **A** I'm sure their records can say that.

7 THE COURT: You said, what, about 2011 somewhere?

8 MR. RICE: Hien, can you bring up Plaintiffs' Exhibit  
9 345, please.

03:13:59 10 And can you pull up the -- first of all, let's  
11 pull up the name and address up at the top if you would, please.

12 BY MR. RICE:

13 **Q** So this is -- this is an exhibit that the Plaintiffs have  
14 put in the record in this case, shows Shae Cottar. That's you,  
03:14:27 15 correct?

16 **A** Correct.

17 **Q** 3206 Briar Court. That was the address you were living in  
18 at the time?

19 **A** Yes, sir. Correct.

03:14:33 20 MR. RICE: And now, Hien, if you would please, show  
21 the second part where -- where it has the date.

22 BY MR. RICE:

23 **Q** Okay. So does that help you remember when you first became  
24 a member of the Sierra Club?

03:14:56 25 **A** Yes, sir.

Cottar - Cross/Rice

1 Q Which is October 4, 2010, correct?

2 A Correct.

3 Q Which happens to coincide with the first time that you  
4 became connected with Mr. Kratka and his organization out of  
03:15:09 5 Boston; is that correct?

6 A It does happen so, yes, sir.

7 Q Now, before you began work for Air Alliance, you were not a  
8 member of Sierra Club, correct?

9 A I had never heard of Sierra Club, correct.

03:15:20 10 Q You were not a member of Environment Texas at the time?

11 A Correct.

12 Q In fact, you're still not a member of Environment Texas.  
13 Have I got that correct?

14 A Correct.

03:15:30 15 Q Now -- so if you first became a member of Sierra Club in  
16 October 4, 2010, you'd agree with me that you weren't a member  
17 of the Sierra Club on November 30, 2009; is that correct? Do  
18 you agree with that?

19 A Correct.

03:15:52 20 MR. RICE: Hien, can you bring up the 395?

21 BY MR. RICE:

22 Q By the way, are you aware that before the Plaintiffs'  
23 environmental advocacy groups like these can file suit, they  
24 have to give notice to certain -- they have to give notice to  
03:16:16 25 the entities they intend to sue? Do you understand that?



Cottar - Cross/Rice

1 **A** Yes, sir.

2 **Q** They also have to give notice to some of the regulatory  
3 agencies and government agencies. Do you understand that?

4 **A** It makes sense.

03:16:27 5 **Q** Were you aware, sir, that the Plaintiffs in this case had  
6 given notice to Exxon November 30, 2009 --

7 **A** No, sir.

8 **Q** -- that they intended to sue Exxon?

9 **A** No. That's the first time I heard this.

03:16:44 10 **Q** Well, I will submit to you --and it's there on the  
11 screen -- an exhibit that Mr. Nicholas put in the record today  
12 as an exhibit declaring that they timely filed notice and the  
13 first notice they gave was November 2, 2009.

14 **A** Okay.

03:17:10 15 **Q** But you weren't a Sierra Club member at the time, were you?

16 **A** No, sir.

17 **Q** Now, you gave a deposition in this case back in May of  
18 2012. Do you remember that?

19 **A** Yes, sir.

03:17:19 20 **Q** I took your deposition in our office here in Houston?

21 **A** I remember that.

22 **Q** And at the time you told me that you had never attended any  
23 Sierra Club meetings?

24 **A** I had -- I don't have any recollection of that, but I'm  
03:17:31 25 sure if the deposition shows that, that's the case.

Cottar - Cross/Rice

1 Q Well, and I just wonder, has that changed since you joined  
2 the team?

3 A No, sir.

03:17:47

4 Q Now, as of May 14, 2012, at your deposition, you also had  
5 never taken part in Sierra Club activities. That's what you  
6 told me that day.

7 A Okay.

8 Q Has that changed since you joined the team?

9 A May I answer more than a yes or no?

03:18:00

10 THE COURT: If you can't answer yes or no -- just so  
11 state if you can't answer it yes or no.

12 THE WITNESS: I can't answer that yes or no.

13 THE COURT: All right. Do you want to follow up or do  
14 you want --

03:18:08

15 BY MR. RICE:

16 Q Aside from joining the team and being here today in this  
17 Sierra Club activity, have you taken part in any other Sierra  
18 Club activity since you joined the team?

19 A Yes, sir.

03:18:19

20 Q Now, I want to talk about where you've lived because you  
21 testified earlier that there's been a couple of moves -- in  
22 fact, there's been three or four moves in the past 12 or 15  
23 years, right?

24 A Three.

03:18:38

25 Q Okay.

Cottar - Cross/Rice

1 MR. RICE: Hien, can you bring up the first slide,  
2 please?

3 BY MR. RICE:

03:18:50

4 Q Now, this is your current address, right, 1008 Wright  
5 Boulevard?

6 A Correct.

7 Q I think you testified -- or you said about -- approximately  
8 two miles, but give or take two miles or so?

9 A Sure.

03:18:56

10 THE COURT: What do you mean give or take two miles?  
11 It says approximately three miles on your graphic.

12 MR. RICE: Well, your Honor --

13 MR. KRATKA: Objection, your Honor. There's no  
14 foundation for this exhibit or for the mileage numbers.

03:19:08

15 THE COURT: Overruled. Let's see what he says because  
16 I saw that, too. All right. Where do you get three from?

17 MR. RICE: Your Honor, we approximated it at three  
18 miles. The witness earlier approximated it at two miles.

19 THE COURT: Very well. Move on. Gotcha. Go on.

03:19:20

20 I shouldn't use that term. I understand.

21 MR. RICE: Yes, sir.

22 BY MR. RICE:

23 Q Nonetheless, the address is correct, yes?

24 A Yes, sir.

03:19:28

25 Q And you moved to that address August, 2012, right?

Cottar - Cross/Rice

1 **A** Correct.

2 **Q** Okay.

3 MR. RICE: Hien, if you'll bring up the next.

4 BY MR. RICE:

03:19:36 5 **Q** Now, prior to moving to your current residence, you lived  
6 at 3206 Briar Court which you told us earlier you approximated  
7 at a quarter mile, right?

8 **A** Yes, sir.

9 **Q** So we have a difference in the approximations; but,  
03:19:50 10 nonetheless, we're not off too far, right?

11 MR. KRATKA: Objection, your Honor. It's unclear  
12 what -- the distance between which two points are being  
13 estimated.

14 THE COURT: Overruled.

03:20:04 15 BY MR. RICE:

16 **Q** The address is correct, sir?

17 **A** Yes, sir.

18 **Q** The dates are correct? Are those the dates at which you  
19 lived at Briar Court?

03:20:12 20 **A** Yes, sir.

21 **Q** Is Briar Court also sometimes known as Shady Hill Street?

22 **A** No, sir.

23 **Q** Okay. Well, I'm not trying to trick you. The only reason  
24 I ask is because in your declaration that you gave in this case,  
03:20:29 25 I think you said it was Shady Street and at your deposition you

Cottar - Cross/Rice

1 said it was Briar Court. And so I want to be -- I want to make  
2 sure that the more accurate --

03:20:42

3 **A** The street -- and I thought I articulated this in my  
4 deposition, but I may not have. The front of the townhouse  
5 faces Shady Hill Street, but my mailbox is on Briar Court.  
6 Therefore, my address is Briar Court.

7 **Q** Very well. Now -- and this is where you were living at the  
8 time you went to work for Air Alliance Houston?

9 **A** Correct.

03:21:04

10 MR. RICE: Okay. Hien, if you would please bring up  
11 the next.

12 BY MR RICE:

13 **Q** Now, prior to the -- to living at the Briar Court address,  
14 you lived at Tri City Beach Road for a year, right?

03:21:16

15 **A** Yes, sir. A little less but 11 months.

16 **Q** Okay. And so would those dates be correct, May, 2009, to  
17 May, 2010, or what are the correct dates?

18 **A** May, 2009, to April, 2010.

03:21:39

19 **Q** And before you lived at the Tri City Beach Road -- and let  
20 me go back. I think that you had told us once or you told us at  
21 the deposition, I believe, that it was about 15 to 20 miles from  
22 the Tri City Beach Road where you lived to the complex. Does  
23 that sound right?

03:22:01

24 **A** I don't have any recollection of that, sir; but again, if  
25 it's in the deposition, I'm sure I did.

Cottar - Cross/Rice

1 **Q** Well, is that not -- is that not a -- the right mileage?  
2 Between the Tri City Beach Road and the ExxonMobil Baytown  
3 Complex, how many miles is it, do you know?

4 **A** I don't know, sir.

03:22:21 5 THE COURT: Now, you're saying he said one time one --  
6 a different one in his deposition, correct?

7 MR. RICE: Yes, sir.

8 THE COURT: All right. Show him the deposition. If  
9 it's not going to matter to you, move on then.

03:22:33 10 MR. RICE: Hien, could you pull up page 14, lines 17  
11 through 22.

12 THE COURT: Why don't you just read it in.

13 BY MR. RICE:

14 **Q** Let's do it this way. Let's go back to our map.

03:23:48 15 Mr. Cottar, I'm not trying to trip you up. I've just -- I just  
16 want to make sure that we're accurate or at least have an  
17 accurate approximation. And I will -- I will represent to  
18 you -- and I can show you your deposition if you'd like; but at  
19 your deposition back in May of 2012, you told us that it was 15  
03:24:03 20 to 20 minutes -- or 15 to 20 miles -- that it was 15 to 20 miles  
21 from the Tri City Beach Road to -- and on 17 I asked the  
22 question, "At the Tri City Beach Road residence that you lived  
23 at prior to moving to Briar Court, how far would that be from  
24 the ExxonMobil complex?" And on line 22 you answer?

03:24:49 25 **A** Okay.

Cottar - Cross/Rice

1 Q What was your answer?

2 A "15 to 20 miles."

3 Q Now, I'm just asking you, is that an -- is that an accurate  
4 approximation that you gave us back in May of 2012?

03:24:58 5 A I would -- I would say no.

6 Q What would you say today was the accurate -- most accurate  
7 approximation of the miles between your Tri City Beach Road and  
8 the ExxonMobil complex, if you know?

9 A I couldn't tell you the mileage.

03:25:16 10 Q Okay, very well. Let's -- before you moved to Tri City  
11 Beach Road, you lived on Cherokee Street, correct?

12 A That's correct.

13 Q And you lived there for 12 years?

14 A Right.

03:25:34 15 Q From approximately sometime in 1997 to May of 2009, would  
16 that be correct?

17 A I believe it was -- that sounds about right.

18 Q And I think you told us earlier that it was about a  
19 15-minute drive from that location to the ExxonMobil complex?

03:25:48 20 A Yes, sir.

21 Q Now, you were living at the Tri City Beach Road address on  
22 November 30, 2009, correct?

23 A Correct.

24 Q And we already know that you weren't a -- you were not a  
03:26:07 25 Sierra Club member on that date?

Cottar - Cross/Rice

1 **A** Correct.

2 **Q** Now, is it interesting to you that -- well, let's do this.

3 Would you agree with me, sir, that the Baytown area is a very  
4 industrial area?

03:26:30 5 **A** Yes, sir.

6 **Q** Entire ship channel very industrialized?

7 **A** Yes, sir.

8 **Q** A number of industrial facilities?

9 **A** Yes, sir.

03:26:36 10 **Q** A number of other refineries?

11 **A** Yes, sir.

12 **Q** A number of other chemical companies, chemical facilities?

13 **A** A couple.

14 **Q** Well, now, a couple that you know of?

03:26:49 15 **A** That I know of. Yes, sir. You asked if I would agree  
16 and --

17 **Q** Sure, sure. Okay. Now, you testified earlier that it was  
18 only until you moved to Briar Court -- or let's put it this way.  
19 Before you moved to Briar Court in April of 2010, your concerns  
03:27:08 20 or complaints were mostly just the general smells?

21 **A** That is correct.

22 **Q** General Baytown odors, right?

23 **A** Correct.

24 **Q** So prior to April of 2010, there aren't any specific events  
03:27:21 25 or specific occurrences that you can point to and say that event



Cottar - Cross/Rice

1 or that date and time concerned me as a Baytown resident?

2 **A** Correct.

3 **Q** Now, sir, you understand that Exxon has permits that allow  
4 it to emit certain amounts of contaminants?

03:27:44 5 **A** Yes, sir.

6 **Q** And these permits allow them to emit these certain -- at  
7 certain times any day of the -- any time of the day?

8 **A** Yes, sir.

9 **Q** Any day of the week?

03:27:53 10 **A** Yes, sir.

11 **Q** Any week of the year?

12 Now, you also understand, sir, that a flaring  
13 event can be an emission event like some of these that you've  
14 already talked about?

03:28:12 15 **A** Right.

16 **Q** But it can also be a permitted activity, you understand  
17 that?

18 **A** Yes, sir.

19 **Q** Now, you talked about some specific events earlier, and I  
03:28:32 20 want to go through -- I want to go down through those.

21 **A** Okay. Yes, sir.

22 **Q** And I want to make a list and I want you to be as specific  
23 as you can and tell me each and every event that has affected  
24 you and you've witnessed at Baytown -- at the Baytown Complex.

03:28:45 25 Can we do that?

Cottar - Cross/Rice

1 THE COURT: Affected or observed or what?

2 BY MR. RICE:

03:28:58

3 Q Let's do it this way. I want to make a list of every  
4 specific event that you can recall that you complained about as  
5 part of this lawsuit. How's that?

6 A I don't know if I'm ready to do that right now.

03:29:15

7 Q Well, this is -- there's no other time to do it, sir. This  
8 is the time. This is trial. Okay. Now, you've already  
9 identified three that's in your direct examination. We'll write  
10 those down, but we'll go through the rest of them, okay?

11 A Okay.

12 MR. RICE: Judge, may I use your flip chart?

13 THE COURT: Sure.

14 BY MR. RICE:

03:29:39

15 Q All right. Earlier you testified that there was a  
16 particular event on July 26, 2011, correct?

17 A Correct.

18 Q And this was one of them that you videoed early in the  
19 morning, correct?

03:30:14

20 A Correct.

21 Q And Mr. Kratka showed you a STEERS report that you  
22 testified links up to that event, the time that you witnessed  
23 it, true?

24 A Right.

03:30:21

25 Q And that was part of Exhibit -- or, yeah, part of

Cottar - Cross/Rice

1 Plaintiffs' Exhibit 17. I believe the number, if I'm not  
2 mistaken, the STEERS number was 157283. That was the first one.  
3 Now, are you certain that that event occurred on July 26, 2011?

4 **A** Yes, sir.

03:30:43

5 MR. RICE: And if I could, Mary, could I get you to  
6 replay that video, just the first video that you showed on  
7 direct.

8 MR. NICHOLS: 398.

03:31:00

9 MR. RICE: That's Exhibit 398, please, and I think  
10 we'll need to flip it.

11 THE WITNESS: May I interject something, your Honor?

12 THE COURT: Yeah, sure.

13 THE WITNESS: I just wanted to make sure that I'm  
14 double-checking the STEERS reports. I've experienced a lot.

03:31:14

15 This is my first time to ever do this, and I just honestly want  
16 to make sure. Yes. Okay. If I'm going to answer definitively,  
17 I'd like to have --

18 THE COURT: All right. Let's go. What's next? What  
19 do you want?

03:31:31

20 MR. RICE: It's Exhibit 398, and I think if Ms. Rock  
21 will be kind enough to replay it for us, I'd appreciate it.

22 BY MR. RICE:

23 **Q** And so your testimony, sir, is that it's July 26 based on  
24 what you saw on that -- on the phone?

03:32:05

25 **A** No, sir.

Cottar - Cross/Rice

1 Q You specifically recall that it was July 26th?

2 A Yes, sir.

3 Q Very well.

4 (Plaintiffs' Exhibit 398 was played in open court.)

03:32:13 5 MR. RICE: Thank you.

6 BY MR. RICE:

7 Q Now, the second event that you testified about was on  
8 September 30, 2011, true?

9 A True.

03:32:21 10 Q And you also testified that you -- subsequent to that event  
11 you went on the STEERS database and looked to see if it was  
12 reported?

13 A Yes, sir.

14 Q And, again, Mr. Kratka showed you that STEERS Report, and  
03:32:41 15 that number was 159900; am I right?

16 A Yes, sir.

17 Q And then, finally, you testified about an emission event on  
18 May -- in May of 2012, correct?

19 A Yes, sir.

03:33:08 20 Q And that was the 22nd of May, I believe?

21 A Correct.

22 Q And you have those STEERS reports in front of you that  
23 Mr. Kratka showed you on direct. So you can correct me if I'm  
24 wrong, but the STEERS number on that event was 168810, right?

03:33:28 25 A Correct.

Cottar - Cross/Rice

1 Q Okay. Now, what other events, Mr. Cottar, can you testify  
2 about here today that you've witnessed out at the Baytown  
3 Complex?

4 A Many.

03:33:57 5 Q Okay. Well, let's start with the first ones. What's the  
6 date? What's the first date?

7 A I can't give you specific dates.

8 Q Okay. Well, let me help you out. You made out a  
9 declaration in this case, right? Do you remember that?

03:34:11 10 A Yes, sir.

11 Q And in your declaration --

12 MR. RICE: And if we may flip the audio -- or the  
13 video, please.

14 And, Hien, if you would, please bring up  
03:34:27 15 paragraph 19.

16 BY MR. RICE:

17 Q In your declaration, Mr. Cottar, you state that in March,  
18 2011, while you were on a tour of the Houston Ship Channel, you  
19 saw flaring from your house. Do you recall that?

03:34:38 20 THE COURT: Shown what from your house?

21 MR. RICE: Flaring.

22 THE COURT: From his house?

23 MR. RICE: From his house.

24 THE COURT: Well, he was --

03:34:50 25 MR. KRATKA: Objection. He was on the ship channel?

Cottar - Cross/Rice

1 THE COURT: Yeah, I don't understand. He was on the  
2 ship channel?

3 BY MR. RICE:

03:34:56

4 Q Well, Mr. Cottar, let me ask you this: Can you explain  
5 that? Can you recall this event of March, 2011?

6 A Yes, sir, I can.

7 Q And do you recall what specific day in March of 2011?

8 THE COURT: What are we looking at up on the screen?

03:35:06

9 MR. RICE: Your Honor, this is a declaration that  
10 Mr. Cottar made out in this case and brought to his deposition.

11 THE COURT: Okay.

12 THE WITNESS: I can't recall a specific date, no, sir.

13 BY MR. RICE:

14 Q Do you recall, was it on the weekend?

03:35:17

15 A No, sir.

16 Q It was during the week?

17 A I believe so.

18 Q And am I right in that you were a part of a group that was  
19 touring the ship channel?

03:35:29

20 A I was not in the group, no, sir.

21 THE COURT: You weren't in the group?

22 THE WITNESS: No, sir.

23 BY MR. RICE:

03:35:41

24 Q The group ended up coming to your house at some point,  
25 right?

Cottar - Cross/Rice

1 **A** Yes, sir.

2 THE COURT: After they toured the ship channel, they  
3 came to your home?

4 THE WITNESS: Yes, sir.

03:35:48

5 BY MR. RICE:

6 **Q** Now, was your -- your home was a tour stop?

7 **A** Yes, sir.

8 **Q** And this was an environmental group, right?

03:35:56

9 **A** It was a -- it was a large number of people, some in  
10 environmental groups, some not.

11 **Q** Okay. But, nonetheless, in March of 2011 during a weekday  
12 at some point, there was what you claim an event that you saw  
13 flaring?

14 **A** Yes, sir.

03:36:11

15 MR. KRATKA: Object -- well, objection. Looking at  
16 the record, it mischaracterizes the statement of the testimony.  
17 It does not say that there was an event. He said there was  
18 flaring going on.

19 THE COURT: Overruled. He said yes.

03:36:25

20 BY MR. RICE:

21 **Q** Did you happen to go on the TCEQ website, like you've done  
22 these other three, and try to determine if an event was  
23 recorded?

24 **A** No, sir.

03:36:33

25 **Q** Did you make a complaint to Exxon about that particular

Cottar - Cross/Rice

1 day?

2 **A** I did not.

3 MR. RICE: Now, Hien, if you will, bring up paragraph  
4 7 of the declaration.

03:36:49 5 BY MR. RICE:

6 **Q** You also say here, looks like, in the second sentence  
7 several times in June and July of 2011 strong smells woke you up  
8 in the middle of the night.

9 **A** Yes, sir.

03:36:59 10 **Q** Now, can you give us any specific dates in July of -- June  
11 and July of 2011 where you --

12 **A** No, sir.

13 **Q** You can't -- you can't link this up to any specific  
14 emission event?

03:37:13 15 **A** Not here right now today.

16 **Q** Now, you go on to say that you later looked at reports of  
17 upset events on the TCEQ website and saw that these upset events  
18 had occurred at the same times and dates, but you're telling  
19 this Court that you can't provide this Court any specific about  
03:37:37 20 these particular events in June or July of 2011?

21 **A** That's correct.

22 **Q** You also earlier testified that there were times when you  
23 were taking your family to the nature center when there -- the  
24 Baytown Nature Center when there might be a flaring event or an  
03:38:05 25 emission event. Do you recall that testimony?



Cottar - Cross/Rice

1 **A** Yes, sir.

2 **Q** Tell me about those times. What dates have you been out to  
3 the Baytown Nature Center and have experienced an emission event  
4 or what you claim to be an emission event coming from the  
5 ExxonMobil complex?

03:38:18

6 THE WITNESS: Your Honor, I can't say a specific date  
7 off the top of my head, but I have a picture that has a date on  
8 it, if I can show that.

9 BY MR. RICE:

03:38:39

10 **Q** Are you referring to the picture that you showed me during  
11 your deposition?

12 **A** No, sir.

13 **Q** Does this picture show the date that you were at the --

03:38:49

14 **A** It doesn't show the date the picture was taken, but it  
15 shows the date the picture was posted, and the two were the same  
16 date.

17 THE COURT: Posted being where, online?

18 THE WITNESS: On Facebook, yes, sir.

19 BY MR. RICE:

03:38:59

20 **Q** Do we have this photo?

21 **A** If I can pull it up. My phone was almost dead earlier.

22 **Q** While you're doing that, Mr. Cottar, are there any other  
23 times, specific dates that you can tell -- that you can give  
24 this Court that you've experienced what you thought was an

03:39:51

25 emission event from Exxon and subsequently verified that through

Cottar - Cross/Rice

1 the STEERS website?

2 **A** No, sir.

3 **Q** Are there any other dates that you can give this Court when  
4 you experienced what you thought was an emission event

03:40:06 5 regardless of whether you verified it on the STEERS website?

6 **A** Not specific dates.

7 **Q** Okay. Do you recall the date on which you took this photo  
8 that you're getting ready to show us?

9 **A** If I can pull it up.

03:40:50 10 THE COURT: Counsel, do you want to give him some time  
11 to pull it up? It's been almost an hour and a half that we've  
12 been in session.

13 MR. RICE: I think, Judge, if we look at this photo,  
14 then we can --

03:41:05 15 THE COURT: Yeah, sure.

16 THE WITNESS: Sorry. I've never done this. I'm very  
17 nervous. January the 14th. That's the photo.

18 BY MR. RICE:

19 **Q** And your testimony today is that's a photo of something  
03:41:22 20 coming from the Exxon complex?

21 **A** Yes, sir.

22 **Q** And where were you when you took this photo?

23 MR. KRATKA: Can we show this to the Judge while he's  
24 testifying?

03:41:35 25 MR. RICE: Sure.

Cottar - Cross/Rice

1 THE WITNESS: That's from the Baytown Nature Center  
2 facing the ExxonMobil facility.

3 BY MR. RICE:

4 Q And the date was January?

03:41:45

5 A 14th.

6 THE COURT: What year?

7 THE WITNESS: 2014.

8 MR. RICE: All right, Mr. Cottar. Thank you.

9 THE WITNESS: Sure.

03:41:59

10 BY MR. RICE:

11 Q Now, let me ask you this: Have you gone onto the STEERS  
12 website and tried to link up an emission event --

13 A No, sir.

14 Q -- with that photo?

03:42:07

15 A I have not.

16 Q So your testimony today is that these five events represent  
17 the universe of emission events that you've witnessed and  
18 complain about in this case today?

19 A No, sir.

03:42:26

20 MR. KRATKA: Objection.

21 BY MR. RICE:

22 Q Well, now, you'll have to tell me -- you'll have to tell me  
23 the rest of them. What other emission events are you  
24 complaining about? Give me a date.

03:42:38

25 THE WITNESS: Your Honor, I feel like those are two

Cottar - Cross/Rice

1 different questions.

2 THE COURT: Okay. Break it down.

3 BY MR. RICE:

03:42:48

4 Q You're complaining about other emission events outside of  
5 these five that we have on this list?

6 A Yes, sir.

7 Q Give me a date for the next emission event that you're  
8 complaining about that should be a part of this case.

9 MR. KRATKA: Objection.

03:42:59

10 THE WITNESS: That's a different question, sir.

11 MR. KRATKA: It's asking the witness to determine what  
12 should be part of the case rather than just asking him about his  
13 personal knowledge.

14 THE COURT: All right. Rephrase it.

03:43:08

15 BY MR. RICE:

16 Q Mr. Cottar, I'm just asking you: Give me some detail. You  
17 understand that the Plaintiffs have made claims in this case  
18 that ExxonMobil has violated permits with emission events,  
19 correct?

03:43:22

20 A Correct.

21 Q You understand that?

22 A I understand that.

23 Q Now, we need to know what specific events that you're  
24 complaining about.

03:43:36

25 A Again, I don't understand protocol in these situations.

Cottar - Cross/Rice

1 I've never testified --

2 THE COURT: Hold it a second. I'll say that's  
3 unresponsive. If you can't answer the question, state it. The  
4 man is going to have to move on or ask another question.

03:43:50

5 BY MR. RICE:

6 Q Let me ask it this way, Judge. Outside of these five for  
7 which you've given the date and three of which you've given us  
8 some information based on STEERS reports, are there any other  
9 events, emission events or occurrences, that you can give us,  
10 that you can provide this United States Court, with specific  
11 details?

03:44:06

12 A No, sir.

13 Q Very well. Now, you'll agree with me, sir, that each one  
14 of these five that you've listed here occurred after October  
15 2010, did it not?

03:44:31

16 A Yes, sir.

17 THE COURT: What's the key for October of 2010? I  
18 know -- I think I know but get in it on the record.

19 BY MR. RICE:

03:44:41

20 Q That's the day you became a Sierra Club member; isn't that  
21 correct?

22 A Yes, sir.

23 Q That's about the same time that you had your initial  
24 conversation with Mr. Kratka?

03:44:49

25 A Yes, sir.

Cottar - Cross/Rice

1 Q And, in fact, that was after you -- Mr. Kratka had already  
2 told you about this lawsuit, right?

3 A These dates, yes, sir.

4 Q You joined the team?

03:45:03

5 MR. KRATKA: Objection.

6 THE COURT: Overruled. It's cross examination.

7 BY MR. RICE:

8 Q In fact, these five events --

03:45:09

9 THE COURT: By the way, I'll extend the same to you,  
10 sir, on cross examination.

11 BY MR. RICE:

12 Q In fact, these same events all occurred after you found out  
13 that you would be -- that you could be a potential witness in  
14 this case for Mr. Kratka's group, right?

03:45:20

15 A Sure. Yes, sir.

16 Q Now, you testified that after the September --

03:45:38

17 THE COURT: Hold it. I think -- I'm not in any rush,  
18 but if -- otherwise, we'll have a tendency to move on and on. I  
19 take a break every hour and -- an hour and a half. It's a  
20 little more than that already. So I have 3:46. We'll get back  
21 in -- now, let me mention to you, we're going to go on until  
22 about -- I always break between 6:00 and 6:05. So we'll take  
23 another really short break in there sometime after 5:00, between  
24 5:00 and 5:30. All right? So my clock is off. We'll see you  
03:45:59 25 back ready to resume at 4:00 o'clock.

Cottar - Cross/Rice

1 (Court recessed at 3:46 p.m.)

2 (Court resumed at 4:02 p.m.)

3 BY MR. RICE:

4 **Q** Mr. Cottar, I only have a few more questions for you.

04:02:50

5 Before I do, I realized that I made a mistake over here

6 transcribing these dates as we were talking about them. The one

7 on May 22nd was actually May 22nd of 2012, correct?

8 **A** Correct.

9 **Q** And I wrote --

04:03:02

10 THE COURT: Now, wait a second. That was one of the  
11 instances he testified about, correct?

12 MR. RICE: That's right, your Honor.

13 THE COURT: And when was the suit filed?

14 MR. RICE: December, 2010.

04:03:12

15 THE COURT: Okay, go on.

16 BY MR. RICE:

17 **Q** It should be 2012, correct?

18 **A** Correct.

19 **Q** So I'm just going to correct that here because I made the

04:03:21

20 mistake. And, also, I'm going to just put up here at the top  
21 your name so that we know throughout the trial that those are  
22 the events that -- that you specifically recall and complain  
23 about.

24 Now, Mr. Cottar, none of these events that you've

04:03:45

25 testified about caused you to seek medical attention; isn't that

Cottar - Cross/Rice

1 true?

2 **A** Correct.

3 **Q** And, in fact, you don't contend that you personally have  
4 health problems that have been caused by or have been  
04:03:57 5 exacerbated by what ExxonMobil has done, true?

6 **A** That's incorrect.

7 **Q** What is incorrect about that statement?

8 **A** I spoke earlier and said that I felt like they had  
9 exacerbated the asthma issues.

04:04:09 10 **Q** Yeah. In fact, you -- you did and earlier testified that  
11 you thought these emission events had exacerbated things. And  
12 you also, I believe, testified that you think there is a  
13 corollary relationship between these emissions events and your  
14 asthma, correct?

04:04:26 15 **A** Causal but not corollary -- I mean, corollary but not  
16 causal.

17 **Q** Okay. Now, have you ever testified differently?

18 **A** Not that I'm aware of, not to my memory.

19 **Q** Do you recall giving a deposition in this case?

04:04:36 20 **A** I do.

21 **Q** Back in May 14, 2012?

22 **A** Correct.

23 **Q** Held in my office here in Houston, right?

24 **A** Correct.

04:04:44 25 **Q** I took that deposition. Do you remember that?



Cottar - Cross/Rice

1 **A** I remember it fondly.

2 **Q** Mr. Kratka was there. Your attorney was there with you?

3 **A** Yes, sir.

4 **Q** And I asked you specifically, "Do you contend that you  
04:05:00 5 have -- you personally have health problems or health issues  
6 that have been caused by or have been exacerbated by what  
7 ExxonMobil has done?"

8 MR. RICE: Hien, can you bring it up?

9 BY MR. RICE:

04:05:19 10 **Q** And I'll just show you what I just read, and then your  
11 answer to that question has been highlighted. And what answer  
12 did you give in your deposition in May 14, 2012?

13 **A** I said that "I do not have any correlative evidence of any  
14 health conditions either exacerbated by or perpetuated by."

04:05:40 15 **Q** But yet, today -- right, perpetuated by ExxonMobil,  
16 correct?

17 **A** Correct.

18 **Q** But today your testimony is different?

19 **A** No, sir.

04:05:46 20 **Q** Well, now --

21 **A** The keyword here --

22 THE COURT: Hold it. Wait a second. No. By the way,  
23 if the lawyers for your -- who called you want to follow up,  
24 they will. But this is cross examination.

04:05:56 25 Go right ahead.

Cottar - Redirect/Kratka

1 THE WITNESS: I'm sorry. My apologies.

2 BY MR. RICE:

3 Q On May 14, 2012, when we took your deposition in this case,  
4 you said that you didn't have any correlative evidence?

04:06:11

5 A Correct.

6 Q You didn't have any evidence to suggest that there was any  
7 corollary relationship between your asthma or any other health  
8 condition and these emission events by ExxonMobil, correct?

9 A Correct. Evidence, yes, sir.

04:06:24

10 Q Well, in fact, you don't have any evidence of that sitting  
11 here today, do you?

12 A No, sir.

13 MR. RICE: That's all I have for now, Judge.

14 THE COURT: Okay. Go right ahead.

04:06:34

15 REDIRECT EXAMINATION

16 BY MR. KRATKA:

17 Q Let's stay with that question and answer, Mr. Cottar.

18 A Sure.

19 MR. KRATKA: Could we leave that on the screen?

04:06:51

20 THE COURT: Why don't we put that back on the screen,  
21 please. I'll stop your time until it goes up.

22 Go on.

23 BY MR. KRATKA:

24 Q Save five seconds. Mr. Cottar, you answered -- when

04:07:09

25 Mr. Rice asked you whether your testimony during your deposition

Cottar - Redirect/Kratka

1 was inconsistent with your testimony today, you answered that it  
2 was not, correct?

3 **A** Correct.

04:07:22

4 **Q** Can you explain why you believe your testimony then is not  
5 inconsistent with your testimony today?

04:07:45

6 **A** Correct. Yes, sir. The keyword in that sentence there is  
7 evidence. And as I understand it, evidence in this context  
8 would be doctor's reports, some sort of -- some sort of hard  
9 fact. And I said earlier today "I believe." And that's  
10 different than evidence. I wouldn't use the word "believe" if I  
11 had evidence. I would say, "I know."

12 **Q** And what has your experience been in terms of experiencing  
13 emissions that you've observed from Exxon and experiencing  
14 health effects?

04:08:08

15 **A** My experience is that living a quarter mile, half a mile,  
16 whatever the distance actually is, living at the 3206 Briar  
17 Court address, we experienced far more asthma issues on a  
18 consistent basis than since we moved or before that point.

19 **Q** And were any of those asthma issues also --

04:08:24

20 MR. KRATKA: Strike that.

21 BY MR. KRATKA:

22 **Q** Were any -- were any specific incidents of exacerbated  
23 asthma issues, did they occur at the same time --

24 **A** Yes, sir.

04:08:38

25 **Q** -- as your experience of emission events?

Cottar - Redirect/Kratka

1 **A** Yes, sir.

2 **Q** Thank you.

3 And Mr. Rice also asked you a number of questions  
4 about specific dates. Did you create a written record of every  
04:08:56 5 incident -- every time that you experienced what you believed  
6 was an air emission event?

7 **A** I did not.

8 **Q** And are you able just through your memory to recall every  
9 single -- the date of every incident that you experienced?

04:09:09 10 **A** I cannot.

11 **Q** But as you testified earlier -- let me just recall your  
12 earlier testimony. Were there numerous instances when you did  
13 experience emission events?

14 **A** Yes, sir.

04:09:20 15 **Q** And were there numerous instances other than those listed  
16 on the chart that you were able to match up your experience with  
17 specific STEERS events?

18 **A** At the time, yes, sir.

19 **Q** So at the time you were able to match them?

04:09:34 20 **A** I was able to match them up.

21 **Q** But sitting here right now, your memory is insufficient to  
22 recall the dates?

23 **A** Correct.

24 **Q** And --

04:09:50 25 MR. KRATKA: Your Honor, we're going -- we're in the

Cottar - Redirect/Kratka

1 process of providing a copy of the picture from January, 2014,  
2 of the flaring event that Mr. Cottar photographed. We're in the  
3 process of trying to get a copy of it to the Court, and we want  
4 to tender -- would like to offer that as Plaintiffs' Exhibit  
5 612.

04:10:07

6 THE COURT: Any objection?

7 MR. RICE: No objection, your Honor.

8 THE COURT: It's admitted. Don't forget we need to  
9 give numbers and check with my case manager on this when there  
10 are new pieces of evidence.

04:10:21

11 MR. KRATKA: For the record, I would like to state  
12 that I didn't have it at hand before but the exhibit --  
13 Plaintiffs' exhibit number for the Baytown map is Plaintiffs'  
14 Exhibit 396.

04:10:34

15 THE COURT: Therefore, this picture was 397.

16 MR. KRATKA: No, no, no.

17 THE COURT: Okay. Something else?

18 MR. KRATKA: Yes.

19 THE COURT: Oh, I see.

04:10:39

20 MR. KRATKA: I'm sorry. Jumping back to the --

21 THE COURT: No. The Baytown map was already  
22 identified, but we didn't have the number.

23 MR. KRATKA: It's 396 and will be labeled as such.

24 That's all I have, your Honor.

04:11:12

25 THE COURT: Anything further?

Cottar - Recross/Rice

1 MR. RICE: Briefly, your Honor.

2 RECROSS EXAMINATION

3 BY MR. RICE:

04:11:19

4 Q Mr. Cottar, you can't, sitting here today, give this Court  
5 any specific data or specific dates related to any other events  
6 from ExxonMobil outside of these five we listed here, correct?

7 MR. KRATKA: Objection. Asked and answered.

8 THE COURT: Sustained.

9 BY MR. RICE:

04:11:30

10 Q And that's because you didn't keep a written record as  
11 Mr. Kratka just asked you, right?

12 MR. KRATKA: Objection. Asked and answered.

13 THE COURT: Sustained. Got it.

14 BY MR. RICE:

04:11:42

15 Q And you didn't keep a written record because the TCEQ  
16 personnel that you met with, Mr. Bautista, gave you the log  
17 sheet to keep that written record with. You just threw it away,  
18 didn't you?

19 MR. KRATKA: Objection. Asked and answered.

04:11:55

20 THE COURT: Overruled.

21 THE WITNESS: Correct.

22 MR. RICE: Nothing else, your Honor.

23 THE COURT: Anything further, Counsel?

24 MR. KRATKA: No, sir.

04:12:02

25 THE COURT: Thank you. You may step down. You're

Aguirre - Direct/Kratka

1 excused. You're free to leave. Now, you may stay in the  
2 courtroom, but you're free to leave.

3 All right. Call your next witness.

4 MR. KRATKA: Plaintiffs call Diane Aguirre.

04:12:42

5 THE COURT: Yes, ma'am. Do you want to come down the  
6 center, please?

7 Raise your right hand to be sworn, please.

8 (The witness, **DIANE AGUIRRE**, called on behalf of the  
9 Plaintiff, was sworn.)

10 THE COURT: Have a seat, please.

11 Get comfortable. Pull that microphone in. The  
12 chair does not move forward.

13 Okay, go right ahead.

14 MR. KRATKA: Thank you.

15 DIRECT EXAMINATION

16 BY MR. KRATKA:

17 **Q** Would you state your name for the record, please.

18 **A** Diane Aguirre.

19 THE COURT: How do you spell your last name, please.

04:13:10

20 THE WITNESS: A-g, as in Gary, u-i-r-r-e.

21 BY MR. KRATKA:

22 **Q** And where did you currently live, Ms. Aguirre?

23 **A** I live in Oakland, California.

24 **Q** And before moving to Oakland, did you -- where did you live  
25 before moving to Oakland?

04:13:25

Aguirre - Direct/Kratka

1 **A** The Houston area. I grew up in Baytown.

2 **Q** Okay. And we'll get to the more details on that in a  
3 minute. Are you currently a member of the Sierra Club?

4 **A** Yes.

04:13:34 5 **Q** And when did you first join the Sierra Club?

6 **A** In June of 2010.

7 **Q** And you joined by paying membership dues?

8 **A** Yes.

9 **Q** And over the years have you renewed those membership dues?

04:13:46 10 **A** I have.

11 **Q** And is your membership current?

12 **A** It is.

13 **Q** And similarly, did you join -- are you a member of  
14 Environment Texas?

04:13:52 15 **A** I am.

16 **Q** And when did you first join Environment Texas?

17 **A** June, 2010.

18 **Q** Okay. And similarly, did you pay membership dues to join  
19 and renew those dues?

04:14:04 20 **A** Yes, I did.

21 **Q** And you're currently -- your membership is current?

22 **A** Yes, it is.

23 **Q** How did it come about that you joined Sierra Club and  
24 Environment Texas back in June of 2010?

04:14:13 25 **A** I had been aware of the groups before, and I became a



Aguirre - Direct/Kratka

1 member when I heard that this was going on and I want to be a  
2 part of it.

3 **Q** And "this" meaning this lawsuit?

4 **A** Exactly.

04:14:26 5 **Q** So you joined the clubs because you were -- wanted to  
6 participate in the lawsuit?

7 **A** Yes.

8 **Q** Okay. And you said you were originally from Baytown. Did  
9 you grow up in Baytown?

04:14:38 10 **A** I did grow up there.

11 **Q** From what age?

12 **A** We moved there from Los Angeles when I was about six, and I  
13 -- we lived in pretty much the same area up until I went to  
14 college.

04:14:53 15 **Q** And what was the address of the home you grew up in?

16 **A** 1016 Dailey Street.

17 **Q** Can we go through the map again, your Honor?

18 THE COURT: Sure.

19 BY MR. KRATKA:

04:15:08 20 **Q** Plaintiffs' Exhibit 396.

21 Are you able to identify on this map where your  
22 home is? You can stand up and walk up to the map if you --

23 **A** It's a little hard to see. I can't read any of the  
24 letters.

04:15:35 25 **Q** Why don't you come around and look at the map itself and

Aguirre - Direct/Kratka

1 see if you can circle where your -- approximately where your  
2 home is.

3 **A** Sure. Right here.

4 **Q** I'm going to circle that and put an "A" -- D. A., your  
5 initials.

04:16:09

6 MR. NICHOLAS: You have to adjust the map.

7 MR. KRATKA: Yeah.

8 THE COURT: Where was it?

9 MR. KRATKA: Right here, your Honor. Yes, right here.

04:16:20

10 BY MR. KRATKA:

11 **Q** And, Ms. Aguirre, is the Baytown Complex located on this  
12 part of the map?

13 **A** It is.

14 **Q** And do you know how far roughly your home is -- your  
15 parents' home is from the Baytown Complex?

04:16:31

16 **A** It's about a mile and a half.

17 **Q** Okay. Are there -- are you aware of any other industrial  
18 facilities that are closer to your home than the Baytown  
19 Complex?

04:16:46

20 **A** No.

21 **Q** When you grew up in that home in Baytown, who else lived in  
22 your household?

23 **A** My parents, my mom and my dad, my sister, and my brother.

24 **Q** And are you -- how -- what's the relationship in ages  
25 between you and your brother and sister?

04:17:01

Aguirre - Direct/Kratka

1 **A** I'm 25. My brother is 20, and my sister is 15.

2 **Q** And do you have other family also in Baytown?

3 **A** I do. I have a lot of family.

4 **Q** Could you -- just a very quick rundown of what other parts  
04:17:16 5 of the family live in Baytown?

6 **A** Sure. My grandma. My -- one of my mom's sisters, my aunt,  
7 an uncle. And their family, their spouses and maybe like  
8 ten-ish cousins in total.

9 **Q** Where do they live in relation to your parents' home?

04:17:37 10 **A** They live really close by. It's like a ten-minute drive to  
11 get to any of their houses.

12 **Q** And where did you graduate -- where did you go to high  
13 school?

14 **A** I went to Sterling High School.

04:17:48 15 **Q** Is that in Baytown?

16 **A** It is.

17 **Q** What year did you graduate?

18 **A** In 2010.

19 **Q** 2010?

04:17:53 20 **A** Sorry, 2005.

21 **Q** 2005. And after graduating high school, did you go to  
22 college?

23 **A** I did.

24 **Q** And where did you initially attend college?

04:18:01 25 **A** I initially attended Lee College, which is in Baytown,

Aguirre - Direct/Kratka

1 also.

2 **Q** And about approximately is Lee College -- where is Lee  
3 College in relation to the Baytown Complex?

4 **A** It is very close. I would say, like, less than two miles  
5 away.

04:18:18

6 **Q** And when you attended Lee College, did you live at home?

7 **A** I did.

8 **Q** And that year was 2010 -- sorry.

9 **A** 2005. Yeah, 2005, 2006.

04:18:31

10 **Q** And did you change --

11 THE COURT: Lee College, that's a junior college?

12 THE WITNESS: It is.

13 THE COURT: Did you get a degree?

14 THE WITNESS: I did.

04:18:37

15 THE COURT: An AA?

16 THE WITNESS: No. I went to the University of Houston  
17 after a year.

18 THE COURT: All right. So you graduated University of  
19 Houston?

04:18:44

20 THE WITNESS: Uh-huh.

21 THE COURT: What was your major?

22 THE WITNESS: I got a BA in English and a BS in  
23 political science.

24 BY MR. KRATKA:

04:18:50

25 **Q** And what year did you graduate from the University of

Aguirre - Direct/Kratka

1 Houston?

2 **A** 2010.

3 **Q** And when you attended the University of Houston, where did  
4 you live?

04:18:57 5 **A** I lived on campus.

6 **Q** In Houston?

7 **A** Yes.

8 **Q** And, I'm sorry, did you spend any time at your parents home  
9 when you were attending the University of Houston?

04:19:11 10 **A** Yeah. Every summer I would spend at my parents' house.  
11 And I would come home on the weekends, pretty much every  
12 weekend.

13 **Q** Every weekend all through the three years at the University  
14 of Houston?

04:19:22 15 **A** It was actually four years there, and, yes, pretty much  
16 every weekend.

17 **Q** Okay. Did you spend summers at home?

18 **A** Yes.

19 **Q** What about school vacations, holidays?

04:19:32 20 **A** Yeah. Christmas, everything like that.

21 **Q** You spent them all at home --

22 **A** Yes.

23 **Q** -- in Baytown? And what year did you graduate from the  
24 University of Houston?

04:19:41 25 **A** 2010.

Aguirre - Direct/Kratka

1 Q And after that, what was your first job out of college?

2 A I worked with Texas Campaign for the Environment as a field  
3 organizer.

4 Q And did you still live in Houston?

04:19:52 5 A I did still live in Houston.

6 Q And --

7 MR. KRATKA: Strike that.

8 BY MR. KRATKA:

9 Q What did you do for the Texas Campaign for the Environment  
04:20:01 10 as a field organizer?

11 A It's door-to-door political organizing. So I went to  
12 people's doorsteps and talked to them about environmental issues  
13 and then asked them to write letters to elected officials and I,  
14 also, fundraised.

04:20:17 15 Q And what -- why did you decide to do that kind of work?

16 A Because it was important. I think it's important to  
17 protect the environment. I think definitely growing up in  
18 Baytown had a lot to do with that attitude.

19 Q Why did growing up in Baytown influence your feelings about  
04:20:36 20 environmental work?

21 A Because I saw the effects of air pollution, just not living  
22 in a place that had a good environment.

23 Q What did you do after -- how long were you with Texas  
24 Campaign for the Environment?

04:20:50 25 A In total, about two and half years.

Aguirre - Direct/Kratka

1 Q And you lived in Houston the whole time?

2 A Yes.

3 Q What did you do after leaving that organization?

4 A A couple of different things. I worked for a travel  
04:21:03 5 agency. I did some kind of writing and other jobs.

6 Q What are you doing current for employment?

7 A I'm a travel writer.

8 Q When did you move from Houston to Oakland?

9 A That was in February -- sorry, March of 2013.

04:21:21 10 Q And have you been back to Baytown since you moved last  
11 March?

12 A Yes, twice.

13 Q And when was the first time you were back in Baytown?

14 A For Christmas.

04:21:31 15 Q This past Christmas?

16 A Uh-huh. I came for a week and to see family.

17 Q And when was the second time?

18 A This last weekend.

19 Q All expenses paid tour of Houston.

04:21:44 20 Are you planning to come back to Baytown in the  
21 near future?

22 A For the holidays probably next year -- or sorry, this year.

23 Q So you will -- you have plans to come back and stay at your  
24 parents' home again?

04:21:58 25 A Yes.

Aguirre - Direct/Kratka

1 Q Now, growing up in Baytown and living there, the time  
2 you've spent in your parents' home, were you aware of the  
3 ExxonMobil Baytown Refinery --

4 A I was.

04:22:14 5 Q -- Complex?

6 A It was part of daily life.

7 Q How so?

8 A Well, pretty much a lot of my friends' parents worked for  
9 Exxon and just driving passed it, it's really hard to miss this  
04:22:26 10 big, you know, industrial area and other things, like smells  
11 that would come up, sounds. It was --

12 Q All right. I'll ask you a few more -- I'll try to ask you  
13 some more specific questions. You just mentioned smells. What  
14 types of smells are you talking about that you associate with  
04:22:47 15 the Exxon complex?

16 A The two main ones are this like sulfury -- sulfur kind of  
17 smell and a gasoline smell.

18 Q And why do you associate those odors with the Exxon  
19 complex?

04:23:05 20 A They were around pretty often and it is a huge complex and  
21 the closest one to where I grew up so it makes sense.

22 Q Could you smell these odors while -- or can you smell these  
23 odors while you're at your parents' home?

24 A Yes.

04:23:24 25 Q And could you smell these odors, for example, when you were



Aguirre - Direct/Kratka

1 at Lee College?

2 **A** Yes.

3 **Q** Could you tell any difference in the intensity or the  
4 frequency of the odors between the time you were at Lee College  
04:23:38 5 and the time you spent at home?

6 **A** Not specifically, no.

7 **Q** Okay. During your time in Baytown, did you spend time at  
8 any -- or have you spent time at any parks or other outdoor  
9 areas near the Exxon complex?

04:23:56 10 **A** Pretty often. Bicentennial Park is really close to my  
11 house, and we spend time there.

12 **Q** And when you spend time at Bicentennial Park, did you ever  
13 smell any of these odors that you associated with the Exxon  
14 complex?

04:24:14 15 **A** Very often.

16 **Q** And are there some days when these odors that you're  
17 describing are worse or more intense than others?

18 **A** Definitely. It's not constant. They're definitely times  
19 when it is more pronounced and noticeable than others.

04:24:32 20 **Q** Now, when an odor is more pronounced, are you able to link  
21 up -- are you able to tell whether there is something going on  
22 at the Baytown Complex that is associated with those odors?

23 **A** No. Growing up, I didn't have a lot of communication with  
24 what was going on in the plant or knowing, like, what -- what  
04:24:55 25 those odors were exactly. I couldn't point to any specific --

Aguirre - Direct/Kratka

1 anything specific.

2 **Q** Okay. And you also mentioned seeing things regarding to  
3 the -- with respect to the Baytown Complex. Are you referring  
4 to actually being able to see evidence of air pollution?

04:25:14 5 **A** Yeah. Sometime -- well, there's, you know, smoke coming  
6 out of, you know, various places in the refinery. And other  
7 times there would be this haze that was kind of like brownish.

8 **Q** Was that haze coming from the complex?

9 **A** Yeah. It's pretty easy to see that it's, you know, kind of  
04:25:38 10 like lingering over there.

11 **Q** For example, if you're driving over the Fred Hartman Bridge  
12 going over the Ship Channel, can you see that haze over the  
13 complex?

14 **A** Yeah, especially going down Spur 330, like a -- I think a  
04:25:52 15 clearer picture of the whole complex.

16 **Q** Going back to Plaintiffs' Exhibit 396, is this Spur 330?

17 **A** Yes.

18 **Q** When was the last time you drove down Spur 330?

19 **A** It was Saturday when my dad picked me up from the airport.

04:26:12 20 **Q** During that trip, did you observe any emissions at the  
21 Baytown Complex?

22 **A** It was nighttime, so --

23 **Q** Have you ever -- I'm sorry, have you ever seen flaring at  
24 the Baytown Complex?

04:26:27 25 **A** Yes.

Aguirre - Direct/Kratka

1 Q And are you familiar with what a flare is or looks like?

2 A I am.

3 Q Can you describe what you've seen in terms of seeing flares  
4 at the complex?

04:26:36 5 A It's -- I mean, it's part of the landscape, essentially.  
6 Just driving past there, you see like flames coming off -- I  
7 don't even know what they're called, but you would see it really  
8 often every time you drove by.

9 Q And seeing the flares or seeing the haze over the complex  
04:26:58 10 or smelling the odors you described, do any of those things  
11 cause you any concern?

12 A Absolutely.

13 Q Can you describe what your concerns are?

14 A Well, it's -- they're, obviously, emitting something into  
04:27:12 15 the air, and I know that they emit cancer-causing chemicals.  
16 So, that's -- that's a really big concern for me.

17 Q And do you have any safety fears or any concerns about  
18 physical safety when you observe flares or other  
19 emission-related experiences at the complex?

04:27:38 20 A I do. Especially growing up, every now and then I would  
21 hear, like, a siren, a really loud siren. I have no idea what  
22 it is. But it was --

23 THE COURT: You don't know what it is?

24 THE WITNESS: No, I don't know what it signified or  
04:27:54 25 why they were sounding it. But it would kind of make me think,

Aguirre - Direct/Kratka

1 what if it's a really terrible emergency and something is about  
2 to blow up. That was the first thing that came to mind.

3 BY MR. KRATKA:

04:28:17 4 **Q** When you smelled odors that you associated with Exxon, does  
5 that -- has that given you any specific concern?

6 **A** It does. Since I'm smelling it, I'm, obviously, breathing  
7 in whatever it is; and like I said, I know that they emit  
8 chemicals that are harmful. And so the smell to me is  
9 associated with something harmful.

04:28:36 10 **Q** Now, do you exercise at all?

11 **A** I do. I like to run.

12 **Q** And when you spend time in Baytown, do you run, jog?

13 **A** I don't usually when I go to Baytown.

14 **Q** Why not?

04:28:51 15 **A** Because the times when I have in the past, it didn't feel  
16 like I was doing something healthy. I would run, and I would  
17 feel kind of, you know, a little bit of, like, labored  
18 breathing. It was very -- it was a very abrasive feeling.

19 **Q** Okay. Abrasive feeling where?

04:29:08 20 **A** In my throat and lungs.

21 **Q** And are you aware of ozone warnings?

22 **A** I am. That was another big concern was -- especially  
23 during the summer, I would hear about ozone warnings, telling me  
24 to stay inside, not to do any kind of strenuous activity. And  
04:29:35 25 so that was -- that was always on my mind when I wanted to

Aguirre - Direct/Kratka

1 exercise at home.

2 **Q** If you felt that the air were cleaner in Baytown around  
3 your parents' home, would you exercise outdoors more frequently?

4 **A** Yeah, absolutely. It's something that I really enjoy, and  
5 it's -- I don't think it's the best idea to do.

04:29:58

6 **Q** Now, have you experienced any health problems growing up in  
7 Baytown?

8 **A** I had allergies, so, like, running nose, watery eyes, kind  
9 of like a constricted feeling in my chest growing up pretty much  
10 year around.

04:30:17

11 **Q** Do you know when that started, at what age?

12 **A** When I was a kid. It must have been, like, between eight  
13 and ten.

14 **Q** And how frequently would you experience these symptoms?

04:30:30

15 **A** At least a couple of times a week.

16 **Q** And did that persist all the way through high school while  
17 you were living in Baytown?

18 **A** Pretty much.

19 **Q** And after you left the -- after you started college and  
20 lived in Houston, was there any change in those respiratory  
21 symptoms?

04:30:44

22 **A** Yeah, they -- there was a little bit of alleviation. I no  
23 longer took the allergy medications that I would take while I  
24 was living at my parents' house, like Claritin, Benadryl, things  
25 like that.

04:31:01

Aguirre - Direct/Kratka

1 Q And how about now? When you're living in Oakland, what are  
2 your respiratory symptoms like?

3 A It's non-existent.

4 Q Now when you returned to Baytown for a week this last  
04:31:18 5 Christmas, did you experience any respiratory symptoms?

6 A I did. The same symptoms that were there when I was a kid,  
7 just runny nose, watery eyes, sneezing.

8 Q Those came back just during the week you were there?

9 A Yes.

04:31:33 10 Q What about after you left and went back to Oakland?

11 A They did not persist when I left.

12 Q Do you have any concerns, any personal impact on you  
13 involving the fact that your parents and family still live where  
14 they live?

04:31:51 15 A Yeah. I worry about them living there and I would prefer  
16 it if they didn't, but sometimes that's not an option. But I  
17 worry that they're -- you know, especially my brother and sister  
18 grew up since -- pretty much they were born, they've lived in  
19 Baytown. And I know that air pollution and stuff like that has  
04:32:11 20 a much bigger effect on children and their development. So, I'm  
21 worried about them, even though they're mostly grown now. I  
22 would prefer it if they were farther away from there.

23 Q Are you aware that Exxon has government-issued permits that  
24 govern their air emissions?

04:32:34 25 A I am aware of that.

Aguirre - Cross/Nichols

1 Q And are you aware that these permits do authorize the  
2 complex to emit certain pollutants into the air?

3 A Yes.

4 Q And do you want to breathe any emissions from the Baytown  
5 Complex that are not authorized by these permits?

6 A No.

7 Q Would it lessen the concerns you've expressed if Exxon did  
8 not put any authorized emissions into the air?

9 A It would lessen my concerns.

10 Q And -- no, I asked that question.

11 MR. KRATKA: I believe that's all I have, your Honor.

12 THE COURT: Thank you. Pass the witness.

13 MR. NICHOLS: May I approach, Judge?

14 THE COURT: Go right ahead.

15 CROSS EXAMINATION

16 BY MR. NICHOLS:

17 Q Good afternoon, Ms. Aguirre.

18 A Good afternoon.

19 Q Ms. Aguirre, you understand that we're here to -- for the  
20 Court to address emissions that were not done in the normal  
21 course of the Baytown Complex. Do you understand that?

22 MR. KRATKA: Objection.

23 THE COURT: I didn't understand the question.

24 BY MR. NICHOLS:

25 Q Ms. Aguirre, do you understand that we're here in this case

Aguirre - Cross/Nichols

1 to address emission events?

2 **A** Yes, violations.

3 MR. KRATKA: Again, I'm sorry, objection. It  
4 mischaracterizes the nature of the case.

04:33:48 5 THE COURT: Well, what is it? Hold it. Let me ask  
6 him what his theory is because we're talking non-jury case.

7 Go on.

8 MR. KRATKA: Emission events are certainly a large  
9 part of the case but there are other violations as well, as  
04:34:01 10 Mr. Nicholas outlined in his opening.

11 THE COURT: All right. Rephrase the question.

12 BY MR. NICHOLS:

13 **Q** So you understand that we're here in part on emission  
14 events, right?

04:34:08 15 **A** Yes.

16 **Q** You understand that we're here in part on emissions that  
17 the Plaintiff groups, that is, Sierra Club and Environment  
18 Texas, say fell outside the ExxonMobil permits, correct?

19 **A** Yes.

04:34:19 20 **Q** Okay. So what we want you to do, Ms. Aguirre, is to tell  
21 the Court, give us a date on which you believed that you were  
22 exposed to emissions from an emission event or emissions that  
23 fell outside the ExxonMobil Baytown Complex permit.

24 **A** I don't think that's the kind of thing that Exxon  
04:34:44 25 necessarily advertises. So it would be really hard to pinpoint.



Aguirre - Cross/Nichols

1 Q I'm asking for you. Do you have any knowledge,  
2 Ms. Aguirre, that you were ever exposed to any emissions from an  
3 emissions event at ExxonMobil?

04:35:04

4 A I could say that I probably have just by the sheer fact  
5 that there have been 4,000 or so since 2005, and I have been  
6 home and visited my family several times since then.

7 Q Yes, ma'am. Just give us -- give us a particular date on  
8 which you say you were exposed to these emissions.

9 A I can't give you a particular date.

04:35:21

10 Q Okay. And give us a particular date on which you were  
11 exposed to any emissions that came outside of ExxonMobil's  
12 permit.

13 MR. KRATKA: Objection. Asked and answered.

14 THE COURT: Overruled.

04:35:32

15 THE WITNESS: I can't do that.

16 BY MR. NICHOLS:

17 Q So what you're describing, Ms. Aguirre, is growing up in  
18 Baytown and being exposed to the atmosphere in Baytown, correct?

19 A Correct.

04:35:47

20 Q Generally? Generally to the atmosphere in Baytown,  
21 correct?

22 A I think you may be a little incorrect because I live really  
23 close to the Exxon facility, in particular.

24 MR. NICHOLS: Sure. And it's -- could we go to 7A,  
25 please?

04:35:58

Aguirre - Cross/Nichols

1 THE COURT: Let's see. You need to go --

2 BY MR. NICHOLS:

3 Q So the residence where you lived --

4 THE COURT: What exhibit again?

04:36:24 5 MR. NICHOLS: This is part of our demonstrative  
6 exhibit. It's Demonstrative 7A, as in Adam.

7 MR. KRATKA: I'm going to object because I certainly  
8 can't tell where -- whatever the dotted line is and which part  
9 of the plant is being compared to the location of the home.

04:36:42 10 THE COURT: Overruled.

11 BY MR. NICHOLS:

12 Q So, Ms. Aguirre, did you -- did your parents live at 1016  
13 Dailey Street in Baytown?

14 A Yes.

04:36:50 15 Q And that, I think you told us, is about two miles away from  
16 the facility; is that correct?

17 A I thought it was a little less than that, maybe a mile and  
18 half.

19 Q Okay. And this is the residence where you lived through  
04:37:03 20 the year 2006 when you went to go to U of H?

21 A Yes.

22 Q Okay. So as of 2006, you would come back to your -- to  
23 your parents' home to visit as you talked about, but your  
24 primary residence from 2006 onward was over at the U of H  
04:37:23 25 campus?

Aguirre - Cross/Nichols

1 MR. KRATKA: Objection. Mischaracterizes the  
2 testimony.

3 THE COURT: Overruled.

4 THE WITNESS: In terms of the --

04:37:30

5 THE COURT: Where did you live most of the time during  
6 that --

7 THE WITNESS: On campus.

8 THE COURT: Okay.

9 BY MR. NICHOLS:

04:37:35

10 Q At the University of Houston?

11 A That's correct.

12 Q Okay. And so you lived there from 2006 until you graduated  
13 in 2010, right?

14 A Yes.

04:37:46

15 Q And when you graduated, 2010, you moved to another location  
16 in Houston?

17 A Yes.

18 Q And that's when you went to go to work for this group  
19 called the Texas Campaign for the Environment?

04:38:01

20 A That is correct.

21 Q So, let's just put a little more flesh on the bones of how  
22 you got involved in the lawsuit.

23 A Uh-huh.

24 Q You were -- the way you became aware of the lawsuit was

04:38:14

25 that somebody from Environment Texas was canvassing the Baytown

Aguirre - Cross/Nichols

1 neighborhood in 2010 about their claims, correct?

2 **A** That's correct.

3 **Q** So somebody from Environment Texas actually went door to  
4 door and talked to your mom, and your mom suggested since you

04:38:30

5 work for Texas Campaign for the Environment that you might be a  
6 good person for them to talk to, right?

7 **A** Yes.

8 **Q** And this was in 2010?

9 **A** That is correct.

04:38:42

10 **Q** So, did you understand, Ms. Aguirre, that as of 2010 that  
11 the Plaintiffs in the case, Environment Texas and Sierra Club,  
12 had already announced to ExxonMobil and to others that they were  
13 going to file a lawsuit?

14 **A** Yes.

04:39:01

15 **Q** Now, Ms. Aguirre, you actually got a call in the spring of  
16 2010 from a paralegal at the National Environmental Law Center;  
17 isn't that correct?

18 **A** Yes.

19 **Q** Now, we got a paralegal here, sitting here. Was it Mary

04:39:22

20 Rock who is sitting here?

21 **A** No. It was Janine Panchok-Berry.

22 **Q** And you understand that during your deposition,

23 Mr. Nicholas told us, made sure we understood, that that person  
24 was a paralegal at the National Environmental Law Center,

04:39:38

25 correct?

Aguirre - Cross/Nichols

1 **A** Yes.

2 **Q** So you got a call about participating in this lawsuit from  
3 a paralegal at the National Environmental Law Center, correct?

4 **A** I did.

04:39:50 5 **Q** Somebody called you and asked you to participate in a  
6 lawsuit, correct?

7 **A** That's correct.

8 **Q** You were here in Texas, correct?

9 **A** Yes.

04:39:59 10 **Q** And you understood the person that was calling you was a  
11 representative of lawyers, maybe out-of-state lawyers but was a  
12 representative of lawyers, correct?

13 **A** Yes.

14 **Q** Now, you said that you joined Sierra Club in June of 2010,  
04:40:20 15 correct?

16 **A** That's correct.

17 **Q** I think you testified that you also joined Environment  
18 Texas in -- you also said June of 2010, I think, is what you  
19 testified to.

04:40:29 20 **A** That's correct, also.

21 MR. NICHOLS: Okay. Let's just put up Plaintiffs'  
22 Exhibit 339 if we could. Let's just highlight the exhibit  
23 sticker, please, first, because this is Plaintiffs' exhibit.

24 Can you just expand it, please; make it bigger.

04:41:21 25 //

Aguirre - Cross/Nichols

1 BY MR. NICHOLS:

2 **Q** Can you read this, Ms. Aguirre.

3 **A** I can.

4 **Q** Do you see that this is a record of you with the group,  
04:41:40 5 Environment Texas, that's actually been produced by the  
6 Plaintiffs and they've actually marked it as an exhibit for  
7 trial? Do you see your name here?

8 **A** Yes.

9 THE COURT: No. What document is this? You don't  
04:41:52 10 need to scroll it back. What's the heading on this?

11 MR. NICHOLS: This is -- it's a document printed off  
12 of a group called ROI Solutions, and this was produced to us,  
13 your Honor, as being the membership information that the  
14 organization had for Ms. Aguirre.

04:42:09 15 THE COURT: Which organization?

16 MR. NICHOLS: This is Environment Texas.

17 THE COURT: Okay. That's the basic background  
18 information?

19 MR. NICHOLS: Yes.

04:42:15 20 THE COURT: Okay.

21 BY MR. NICHOLS:

22 **Q** So this is your -- this is your address where you live now  
23 in Oakland, California?

24 **A** That's correct.

04:42:20 25 **Q** So you currently live out there, correct?

Aguirre - Cross/Nichols

1 **A** Yes, I do.

2 **Q** And then if we look down on the --

3 THE COURT: Excuse me. When did you move to Oakland,  
4 ma'am?

04:42:28 5 THE WITNESS: In March of 2013.

6 THE COURT: Okay.

7 BY MR. NICHOLS:

8 **Q** And by the way, do you have any plans to move back to  
9 Texas?

04:42:35 10 **A** I don't.

11 **Q** You do not?

12 **A** I do not.

13 MR. NICHOLS: Okay. So if we go -- the next section.  
14 Can we grab the next section of the document?

04:42:54 15 We need to grab the part that's just above that.

16 BY MR. NICHOLS:

17 **Q** So, head of household, Ms. Diane Aguirre; and it says  
18 Environment Texas, okay, to contact. And then it says when they  
19 added a record of your membership, correct?

04:43:19 20 **A** Yeah.

21 **Q** Does this help refresh your recollection that you actually  
22 joined this group in December of 2010?

23 **A** I guess I must have.

24 THE COURT: December? Where's December, 2010?

04:43:30 25 MR. NICHOLS: Oh, I'm sorry, your Honor. It's on this

Aguirre - Cross/Nichols

1 little part that we grabbed out. Do you see where it says  
2 "record added"?

3 BY MR. NICHOLS:

4 **Q** It says, "12-9-2010," correct, ma'am?

04:43:40

5 **A** It does.

6 THE COURT: So, Environment Texas. Is that the same  
7 date you joined the Sierra Club?

8 THE WITNESS: I don't think it is.

9 THE COURT: Okay. All right.

04:43:48

10 MR. NICHOLS: I think the record is that she testified  
11 that she joined the Sierra Club in June of 2010, Judge.

12 THE COURT: That's right. June, 2010, but --

13 MR. NICHOLS: But would you agree with me that --

14 THE COURT: Environment Texas when?

04:44:03

15 MR. NICHOLS: December 9th of 2010.

16 THE COURT: Okay.

17 BY MR. NICHOLS:

18 **Q** Would you agree with me that we cleaned up that part of the  
19 record?

04:44:10

20 **A** Yes.

21 **Q** So, Ms. Aguirre, do you know the date on which this lawsuit  
22 was filed?

23 **A** I don't.

24 MR. NICHOLS: Pull it up, please. Pull up the  
25 complaint.

04:44:20



Aguirre - Cross/Nichols

1 THE COURT: The record will speak for itself.

2 All right, there it is. Okay.

3 BY MR. NICHOLS:

04:44:36

4 Q So this is a document that the -- a court record. Do you  
5 see the date that appears at the very top of that page? It says  
6 filed in TXSD on what date, ma'am?

7 A December 13, 2010.

04:44:54

8 Q And so the record reflects that you would have joined the  
9 Environment Texas group, one of the Plaintiffs in the case, as a  
10 member four days before the lawsuit was filed?

11 A Yes.

12 THE COURT: Was it December 9th?

13 MR. NICHOLS: Yes, sir.

14 THE COURT: Okay.

04:45:05

15 BY MR. NICHOLS:

16 Q And as you say, you don't make any bones about it, you  
17 joined both groups because you wanted to participate in the  
18 lawsuit, right?

19 A Yes.

04:45:16

20 Q Now, Ms. Aguirre, you mentioned a little bit about having  
21 seen flares at the Baytown Complex?

22 THE COURT: And you also state that some folks called  
23 you about seeing if you were interested in being a party to this  
24 suit, filing suit, correct?

04:45:30

25 THE WITNESS: That's correct.

Aguirre - Cross/Nichols

1 THE COURT: Okay, go on.

2 BY MR. NICHOLS:

3 Q So, you mentioned about that -- your observations of some  
4 flares at the Baytown Complex, correct?

04:45:41 5 A Yes, I've seen flares.

6 Q And, Ms. Aguirre, do you know whether or not flares are a  
7 normal part of the operation of the complex that are permitted?

8 A I believe that they are up to a certain point.

9 Q Okay. And, so, just like I asked you earlier -- you know  
04:45:57 10 we're trying to drill down as much as we can into the detail.  
11 Can you describe for me having observed any flaring activity at  
12 the Baytown Complex that you knew was outside the course and  
13 scope of the Baytown Complex permits?

14 A No. Like I said, it was part of the landscape. At that  
04:46:17 15 point, growing up there, it's just something that you see all  
16 the time. So, it's like you don't normally count every single  
17 cloud that you see go by on any given day, so --

18 Q But you understand, in answer to my question,  
19 Ms. Aguirre -- I'm trying to get very specific -- if you can  
04:46:33 20 ever recall or ever make the link for us between your observing  
21 a flare out at the Baytown Complex and a time when you knew or  
22 understood that that flaring was outside the range of the  
23 permit?

24 A I can't make that connection for you.

04:46:51 25 Q Okay. Now, the -- let's talk real briefly about your

1 allergies. These were allergies you had when you were a kid,  
2 right?

3 **A** Yeah, through high school.

4 **Q** And you first went -- I think you told us in your  
04:47:11 5 deposition that these allergies cropped up when you were 10 or  
6 11 years old, correct?

7 **A** Correct.

8 **Q** That your parents took you to the doctor, correct?

9 **A** That's correct.

04:47:23 10 **Q** And the doctor prescribed you some allergy medication?

11 **A** Yes.

12 **Q** And you took that allergy medication all the way through  
13 high school?

14 **A** That's correct.

04:47:39 15 **Q** And outside of what you've described as allergies that a  
16 number of us suffer in a number of different places in the  
17 world, are there any other health conditions that somehow limit  
18 your daily routine or your normal life activity that you contend  
19 are related somehow to something that ExxonMobil may have done?

04:48:07 20 **A** No.

21 **Q** And even, Ms. Aguirre, with your allergies and so forth,  
22 you do not have any knowledge of any events at the Baytown  
23 Complex that have resulted in you having experienced harm,  
24 correct?

04:48:31 25 **A** Can you repeat the question?

Aguirre - Cross/Nichols

1 Q Yes, ma'am. And even with your allergies that you've  
2 described for the Court, you do not have any knowledge of any  
3 events at the Baytown Complex that have resulted in you having  
4 experienced harm, correct?

04:48:45

5 MR. KRATKA: Objection. Vague.

6 THE WITNESS: You mean specific events?

7 THE COURT: Overruled.

8 BY MR. NICHOLS:

04:48:54

9 Q I mean specific events, anything that ExxonMobil has done  
10 specifically over the years that has caused you to have  
11 experienced any sort of harm?

12 A Like I said, I can't give you any specific dates on  
13 anything.

04:49:08

14 Q Now, you recall that you gave a deposition in the case,  
15 ma'am, correct?

16 A Yes.

17 Q And you recall being asked in your deposition --

18 THE COURT: Page and line, when you get to it.

19 BY MR. NICHOLS:

04:49:36

20 Q -- that you recall testifying that you had not been to see  
21 a doctor to complain of symptoms that you contend are related to  
22 something that ExxonMobil may have done. Would you agree with  
23 that?

24 A Yes.

04:49:56

25 Q And would you also agree that you don't have any way to

Aguirre - Cross/Nichols

1 know for certain that any of the symptoms that you've ever had  
2 in your life, including your allergy, are related to anything  
3 that ExxonMobil did, correct?

4 **A** I feel that it's --

04:50:16 5 THE COURT: Excuse me. That's yes or no. If you  
6 can't answer it yes or no, state it.

7 THE WITNESS: Okay.

8 THE COURT: Can you answer it yes or no?

9 THE WITNESS: I can.

04:50:20 10 THE COURT: Can?

11 THE WITNESS: Yes.

12 THE COURT: Okay. And your answer?

13 THE WITNESS: No.

14 BY MR. NICHOLS:

04:50:25 15 **Q** So, your answer to my question which was you don't have any  
16 way to know for certain that any of these symptoms are related  
17 to anything that ExxonMobil did, that's a correct statement,  
18 correct?

19 **A** Can you repeat that?

04:50:36 20 **Q** Yes, ma'am. It is correct to say that as you sit here  
21 today before this Court you don't have any way to know for  
22 certain that any of the symptoms you've ever experienced,  
23 including your allergies, are related to anything that  
24 ExxonMobil did, correct?

04:50:51 25 MR. KRATKA: Objection. Asked and answered.

Aguirre - Cross/Nichols

1 THE COURT: Overruled. I think she answered already,  
2 but if you want to do it again --

3 Is that correct?

4 THE WITNESS: Yes.

04:50:58 5 THE COURT: All right.

6 MR. NICHOLS: I'll pass the witness.

7 THE COURT: Thank you.

8 MR. KRATKA: One second, your Honor.

9 THE COURT: Sure.

04:51:26 10 MR. KRATKA: I have nothing. No questions, your  
11 Honor.

12 THE COURT: No questions. Thank you, ma'am. You may  
13 step down. You're excused. You're free to leave. You can  
14 remain in the court if you like, but you're free to leave.

04:51:37 15 Call your next witness.

16 MR. KRATKA: Plaintiffs call Luke Metzger.

17 THE COURT: L-u-k-e, is it?

18 MR. KRATKA: Yes.

19 THE COURT: Last name?

04:51:54 20 MR. KRATKA: M-e-t-z-g-e-r.

21 THE COURT: Have you already been sworn?

22 THE WITNESS: Yes, I was earlier.

23 THE COURT: Okay. Have a seat.

24 //

25 //

Metzger - Direct/Kratka

1 (The witness, **LUKE WILLIAM METZGER**, called on behalf of the  
2 Plaintiff, was previously sworn.)

3 DIRECT EXAMINATION

4 BY MR. KRATKA:

04:52:26 5 **Q** Good afternoon, Mr. Metzger.

6 **A** Good afternoon.

7 **Q** Can you state your full name for the record.

8 **A** I'm Luke William Metzger.

9 **Q** And are you currently employed by Environment Texas Citizen  
04:52:38 10 Lobby?

11 **A** Yes.

12 **Q** And Environment Texas Citizen Lobby is one of the  
13 Plaintiffs in this case?

14 **A** Yes.

04:52:42 15 **Q** And as we go forward, I'll simply refer to the organization  
16 as Environment Texas and you'll understand who I'm referring to?

17 **A** Yes.

18 **Q** What is your job title?

19 **A** I'm the director.

04:52:53 20 **Q** And do you have a college degree?

21 **A** I do.

22 THE COURT: Now, as director, you mean you're top  
23 person?

24 THE WITNESS: Yes.

04:52:59 25 THE COURT: Okay.

Metzger - Direct/Kratka

1 BY MR. KRATKA:

2 Q Where did you graduate from?

3 A The University of Southern California.

4 Q When was that?

04:53:04 5 A 1998.

6 Q And what was your major?

7 A I double majored in political science and theater.

8 Q And just very briefly, can you describe your employment  
9 history since graduating from USC?

04:53:17 10 A I first worked for the California Public Interest Research  
11 Group, CALPIRG, which is a student-based environmental consumer  
12 advocacy organization, the California Public Interest Research  
13 Group, or CALPIRG. And then in 2000, I moved to Texas and  
14 worked for the US Public Interest Research Group, U.S. PIRG. In  
04:53:42 15 2003 I began to work for the Texas Public Interest Research  
16 Group, TexPIRG, and then in 2006 began working with Environment  
17 Texas.

18 THE COURT: When did you become director?

19 THE WITNESS: I believe in 2007, approximately.

04:53:56 20 BY MR. KRATKA:

21 Q And was Environment Texas actually formed in 2006?

22 A Yes.

23 Q And were you involved in the founding of the group?

24 A Yes.

04:54:03 25 Q How were you involved?



Metzger - Direct/Kratka

1 **A** I worked together with our board members to put together  
2 the organization.

3 **Q** Okay. And you said you moved to Texas in the year 2000?

4 **A** Yes.

04:54:18 5 **Q** What brought you to Texas?

6 **A** As a child I had lived in Lawton, Oklahoma, for about seven  
7 years. My father worked at Fort Sill. And, so, I spent a lot  
8 of time as a child in that area, in Wichita Falls area, and had  
9 very fond memories of Texas. And I was, in pursuing

04:54:37 10 environmental work, excited by the challenge of working on  
11 environmental issues here in Texas.

12 **Q** And where is Environment Texas headquartered?

13 **A** In Austin, Texas.

14 **Q** Is that where you live?

04:54:48 15 **A** Yes.

16 **Q** Do you have any children?

17 **A** I do.

18 **Q** How many?

19 **A** I have one son.

04:54:53 20 **Q** How old is he?

21 **A** He's seven years old.

22 **Q** And have you spent much time in the parts of the state  
23 other than Austin?

24 **A** Yes. So both professionally I spend a lot of time

04:55:03 25 traveling to Houston, Dallas, San Antonio, all over, and then

Metzger - Direct/Kratka

1 personally I spend a lot of time exploring the state and  
2 visiting, camping in state parks and enjoying all the great  
3 places Texas has to offer.

04:55:23 4 **Q** And do you do that, you said, both personally and  
5 professionally? Do you travel with your family?

6 **A** Yeah, I bring -- we -- my family, my son and my fiancée and  
7 I, have a particular goal to visit every state park in the  
8 state. I've -- was a Boy Scout and spent -- had fond memories  
9 of spending a lot of time in parks. So, I want to share that  
04:55:40 10 with my son.

11 **Q** And has that contributed to your decision to go into  
12 environmental work as a career?

13 **A** Absolutely. I spent a lot of time, you know, appreciating  
14 nature and learning about the outdoors, and so that helps  
04:55:54 15 instill a deep love for the environment.

16 **Q** And have you received any honors as a result of your work  
17 for Environment Texas?

18 **A** Yes. I was named the -- one of the top lobbyists for  
19 causes by a newsletter called Capitol Inside that monitors the  
04:56:11 20 Texas Capitol. And I was also recently named one of the next  
21 generation Texans which is a -- put together by the University  
22 of Texas and the Strauss Institute. It was a group of a few  
23 dozen kind of rising stars in Texas, everybody from best selling  
24 novelists to George P. Bush and me.

04:56:33 25 **Q** And have you served on any government panels through your

Metzger - Direct/Kratka

1 work?

2 **A** Yes. I served on the Pollution Prevention Advisory  
3 Committee of the Texas Commission on Environmental Quality. I  
4 served on the Open Records Steering Committee at the Office of  
04:56:46 5 the Attorney General of Texas. And I currently serve as a  
6 commissioner on the Austin Resource Management Commission which  
7 helps oversee the electric and water utilities for the city.

8 **Q** Let's talk more about Environment Texas. As founder and --  
9 a founder and the director of the organization, are you familiar  
04:57:04 10 with Environment Texas's by-laws?

11 **A** Yes.

12 MR. KRATKA: And, your Honor, we've submitted the  
13 Environment Texas by-laws as Plaintiffs' Exhibit 338 in case we  
14 need to refer to those.

04:57:15 15 BY MR. KRATKA:

16 **Q** And Environment Texas is a profit or a non-profit  
17 organization?

18 **A** We're a non-profit.

19 **Q** And what is the corporate purpose of Environment Texas?

04:57:24 20 **A** We advocate for Texas's air, land, and water using -- you  
21 know, through research, through grassroots organizing, through  
22 lobbying, and through litigation.

23 **Q** Is it fair to call Environment Texas an environmental  
24 group?

04:57:39 25 **A** Yes.

Metzger - Direct/Kratka

1 **Q** Can you outline your responsibilities as the Environment  
2 Texas director?

3 **A** Yes. I help develop the programs for the organization. I  
4 help oversee our staff. I help raise funds for the organization  
04:57:53 5 and help administer the organization in terms of, you know,  
6 overseeing bookkeeping and tax filings. I lobby directly at the  
7 capitol and kind of our -- one of our main spokespeople to the  
8 media. I do a lot of work with other environmental  
9 organizations to strategize and work together, among other  
04:58:16 10 things.

11 THE COURT: Hang on. Hold it one second. I stopped  
12 the clock.

13 Okay. Go right ahead.

14 BY MR. KRATKA:

04:58:57 15 **Q** Mr. Metzger, is -- based on what you just described, is it  
16 fair to say you're involved in all aspects of Environment  
17 Texas's work?

18 **A** Yes.

19 **Q** And what are Environment Texas's current policy priorities?

04:59:10 20 **A** Right now we're doing a lot of work to promote water  
21 conservation amid the drought that Texas is suffering from. We  
22 are working to promote clean energy and we -- including energy  
23 efficiency and wind and solar power. We had a successful  
24 campaign working to increase funding for our state park system,  
04:59:33 25 clean air, so working to improve -- reduce pollution at power

Metzger - Direct/Kratka

1 plants, refineries, chemical plants around the state.

2 **Q** And have you done any work as far as -- have you done any  
3 work regarding -- that has any relation to the Texas Commission  
4 on Environmental Quality?

04:59:48 5 **A** Yes.

6 **Q** What has that work involved?

7 **A** Around 2003 the state auditor of Texas released a report --  
8 kind of a scathing indictment of the TCEQ's enforcement program.  
9 The quote was that TCEQ --

05:00:13 10 MR. ALEXANDER: Your Honor, I object to the question.

11 THE COURT: Sustained.

12 Next question. You can get around it.

13 BY MR. KRATKA:

14 **Q** Can you describe what your policy work was regarding the  
05:00:23 15 Texas Commission on Environmental Quality?

16 **A** In response to the state auditor's report, we launched a  
17 campaign to get the TCEQ to change its enforcement policies to  
18 better hold violators accountable.

19 **Q** And the spur for that campaign was this report from the  
05:00:39 20 Texas state auditor?

21 **A** Yes.

22 THE COURT: Is there a board for this organization?

23 THE WITNESS: My organization?

24 THE COURT: No, the state organization, the Texas --  
05:00:48 25 what is it?

Metzger - Direct/Kratka

1 MR. KRATKA: Environment Texas?

2 THE COURT: Environment Texas, yes. No, no. I'm  
3 sorry.

4 THE WITNESS: TCEQ?

05:00:55 5 THE COURT: TCEQ.

6 THE WITNESS: There are three commissioners.

7 THE COURT: Who appoints them?

8 THE WITNESS: The governor.

9 THE COURT: All right. Go on.

05:01:01 10 BY MR. KRATKA:

11 Q Now you said you're familiar with the Environment Texas's  
12 by-laws?

13 A Yes.

14 Q Do Environment Texas's by-laws create a class of members as  
05:01:09 15 the term "members" is defined in Texas corporation law?

16 A No.

17 Q And do you know why Environment Texas's by-laws do not  
18 provide for that type of membership?

19 A Yes.

05:01:20 20 Q Why not?

21 A The -- under Texas law, the definition of members, any  
22 member could get access to our entire membership list. And, so,  
23 we feel that's a violation of privacy of our members and could  
24 invite our opposition to join Environment Texas as a way to get  
05:01:41 25 access to our membership list.

Metzger - Direct/Kratka

1 **Q** But can people, nonetheless, join Environment Texas?

2 **A** Yes.

3 **Q** And what are the ways that people can join Environment  
4 Texas?

05:01:47 5 **A** We have two classes of membership. So, they can join by  
6 making a donation or they can become what we call a grassroots  
7 member where they affirm affiliation with us.

8 **Q** So the organization still considers itself to be a  
9 membership organization?

05:02:03 10 **A** Yes.

11 **Q** And do people -- you just answered this. Do people pay  
12 money to join Environment Texas?

13 **A** Yes.

14 **Q** And people can join without paying money as well?

05:02:12 15 **A** Yes.

16 **Q** And do the by-laws -- what do the by-laws refer to those  
17 two classes of people as?

18 **A** Well, the grassroots members are members who don't pay.

19 **Q** I asked a poor question, and I think it was poor because  
05:02:34 20 you've already answered it a minute ago. And I'll withdraw the  
21 question. In your role as director, do you ever communicate  
22 with Environment Texas members?

23 **A** Yes.

24 **Q** And how do you communicate with them, in what ways?

05:02:44 25 **A** Well, we as an organization, going door to door, and

Metzger - Direct/Kratka

1 educating the public is a core part of our mission. And so from  
2 time to time, I'll go out myself and knock on doors, talk to our  
3 members about our issues.

4               Several times a year, I'll sit down and have  
05:02:59 5 about an hour-long meeting with a handful of our members to  
6 brief them on our campaigns, get their feedback, and get their  
7 impact about what they would like to see us prioritize. I will  
8 regularly hold member events. So, for example, just in December  
9 we had a holiday party where the Speaker of the House in Texas  
05:03:19 10 came and briefed our members about our work around -- or to  
11 thank us for our work around water conservation, so met with our  
12 members and spoke with them there about our campaigns.

13               I will sometimes hold advocacy trainings where  
14 I'll meet with our members and teach them skills of citizen  
05:03:41 15 advocacy and also talk to them about our campaigns like that. I  
16 will regularly, you know, post -- well, regularly write e-mails  
17 that go to our members inviting them to sign petitions and get  
18 involved and frequently will get responses from our members  
19 about that issue or other issues and then also through social  
05:04:05 20 media, you know, posting on Facebook and Twitter, ask our  
21 members what they think about a certain issue and get their  
22 input.

23 Q And in your role as director and through all these  
24 activities, have you developed an understanding as to why people  
05:04:21 25 join Environment Texas?



Metzger - Direct/Kratka

1 **A** They join Environment Texas because --

2 MR. ALEXANDER: Your Honor, I object to the  
3 speculation.

4 THE COURT: Sustained.

05:04:27 5 Just rephrase it.

6 MR. KRATKA: Yeah.

7 BY MR. KRATKA:

8 **Q** Let me ask you this: What is your understanding as to why  
9 people join Environment Texas?

05:04:39 10 **A** My understanding -- and I'm a member myself. So I can also  
11 speak to my own experience. But my understanding is that they  
12 join because they seem to get results for the environment.  
13 They've seen that we have helped protect state parks from  
14 closure. We've helped, you know, clean up the air. We've  
05:04:55 15 helped conserve water, you know, amid an historic drought. And  
16 they, you know, are excited about the work that we do through  
17 advocacy, through litigation, through grassroots organizing. So  
18 they believe very strongly in our mission.

19 **Q** Does Environment Texas actively encourage people to join as  
05:05:15 20 members?

21 **A** Absolutely, we -- yes.

22 **Q** And why does Environment Texas seek to have people join as  
23 members?

24 **A** Because we're a -- we're a grassroots organization. We  
05:05:26 25 don't take any money from the government or from corporations or

Metzger - Direct/Kratka

1 unions. We rely entirely on the support of our members and, you  
2 know, we are -- we are a citizens' organization. So when I go  
3 to the capitol and meet with legislators, you know, being able  
4 to show that we have members standing behind us that care about  
05:05:43 5 these issues, I think this is powerful; and it allows us to have  
6 a base of people that we can ask to write letters or show up for  
7 hearings at the legislature and other things. Our members are,  
8 you know, a critical part of the organization. You know, they  
9 define us.

05:06:00 10 **Q** And does Environment Texas have a corporate board of  
11 directors?

12 **A** Yes.

13 **Q** How many people serve on the board?

14 **A** Three.

05:06:08 15 **Q** And do supporting members and grassroots members of  
16 Environment Texas have any role in the selection of the board?

17 **A** Yes. They elect one member of the board.

18 **Q** And can people who are not considered either supporting or  
19 grassroots members vote in board elections?

05:06:28 20 **A** No.

21 **Q** In your role as director, do you keep abreast of the member  
22 numbers of your organization?

23 **A** Yes.

24 **Q** And how many people currently are considered to be  
05:06:37 25 Environment Texas members?

Metzger - Direct/Kratka

1 **A** I believe we are at about 2900.

2 **Q** 2900?

3 THE COURT: And which -- which class of membership?

4 THE WITNESS: That was the dues paying members.

05:06:44 5 BY MR. KRATKA:

6 **Q** And do you know how many members live -- Environment Texas  
7 members live in the Houston area?

8 **A** I believe it's several hundred.

9 **Q** Okay. And do you know whether Diane Aguirre is a member of  
05:06:58 10 Environment Texas?

11 **A** Yes, she is.

12 **Q** And how do you know that?

13 **A** From her membership record.

14 **Q** And you said she is currently a member?

05:07:08 15 **A** Yes.

16 **Q** Okay. And do you know whether Stuart Halpryn is a member  
17 of Environment Texas?

18 **A** Yes, he is.

19 **Q** And how do you know that?

05:07:15 20 **A** From his membership record.

21 **Q** Now, other than your -- the personal efforts and outreach  
22 that you've described, does Environment Texas as an organization  
23 do anything to keep its members apprised of the organization's  
24 work?

05:07:30 25 **A** I'm sorry. Could you say that --

Metzger - Direct/Kratka

1 **Q** Yes. In addition to the communications with members that  
2 you described that you personally participated in, are there any  
3 other ways that the organization communicates its work to its  
4 members?

05:07:43

5 **A** Yes. We have a staff that regularly will go door to door  
6 talking to people about our issues. We have a newsletter that  
7 goes out three times a year and an annual report that comes out  
8 annually. So those would be some of the main ways.

05:08:05

9 **Q** And do members of the organization have any role in setting  
10 the priorities for Environment Texas's policy work?

11 **A** Yes.

12 **Q** In what ways can members affect the organizational policies  
13 and issues of Environment Texas?

05:08:25

14 **A** They can communicate them to us, and we -- as a membership  
15 organization, you know, we take very seriously what our members  
16 are concerned with and what they want us to work on. So that  
17 plays a major role in our deciding our agenda.

18 **Q** And in what ways can members communicate with the  
19 organization?

05:08:39

20 **A** They can communicate through canvasser at their door, to a  
21 caller on the phone, with me or one of my staff during, you  
22 know, the several dozens of meetings we hold with our members  
23 individually, through events we hold like the holiday party I  
24 mentioned or advocacy trainings, online in responding to an  
25 e-mail or something I posted on social media.

05:09:00

Metzger - Direct/Kratka

1 **Q** Can you think of any examples of an issue that Environment  
2 Texas works on that arose from member input or feedback?

3 **A** Our water conservation campaign, we, you know, heard from a  
4 number of members that they're very concerned about the drought  
05:09:22 5 and what it meant to our rivers and, you know, the urgent need  
6 to increase water conservation to help protect our environment.

7 **Q** And can you think of any examples of an issue that  
8 Environment Texas works on that was influenced by the interests  
9 of Houston area members?

05:09:34 10 **A** Yeah. Air quality. Yes. And so our -- a number of our  
11 members are very concerned about air pollution here. They are  
12 especially concerned by the air pollution coming from  
13 petrochemical facilities and -- and then even especially  
14 concerned then that pollution is coming from illegal emission  
05:09:55 15 events. I think they're angry at the events happening and at  
16 the -- what they see as the failure of the state to stop the  
17 violations.

18 **Q** And does this lawsuit fall within that issue area?

19 **A** Yes.

05:10:06 20 **Q** Was this lawsuit approved by the Environment Texas board of  
21 directors?

22 **A** Yes.

23 **Q** And this is -- this is not the first lawsuit that  
24 Environment Texas has brought?

05:10:17 25 **A** No.

1 Q What others have Environment Texas participated in, what  
2 other lawsuits?

3 A A suit against Shell's facility in Deer Park -- a lawsuit  
4 against Shell at their facility in Deer Park and a lawsuit  
05:10:32 5 against Chevron Phillips for their facility in Baytown.

6 Q And can you give just a general description of the nature  
7 of those cases?

8 A They involved emission events and upsets and exceedances of  
9 Clean Air permit -- Clean Air Act permits.

05:10:51 10 Q Similar to this case?

11 A Similar to the case.

12 Q And how did Environment Texas learn about the violations  
13 that, you know, those cases were based upon?

14 A From the STEERS database.

05:11:01 15 Q And what were the outcomes of those two lawsuits?

16 A The companies both settled with us and committed to reduce  
17 their emissions by over 80 percent, to install some additional  
18 monitoring and pollution control, and to pay a penalty. That  
19 money went to support Clean Air projects here in the Houston  
05:11:22 20 area, including one to retrofit dirty diesel school buses to  
21 help reduce exhaust exposed to children.

22 THE COURT: Are those settlements a matter of public  
23 knowledge?

24 THE WITNESS: Yes.

05:11:34 25 THE COURT: All right. How much were they settled

Metzger - Direct/Kratka

1 for?

2 THE WITNESS: Shell was, I think, about \$5.8 million  
3 and Chevron Phillips was \$2 million.

4 THE COURT: All right.

05:11:46 5 MR. KRATKA: And, your Honor, we've submitted those --  
6 both those settlement agreements, one of which was signed by  
7 this Court, the consent agreement, as Plaintiffs' Exhibits 568  
8 for the Shell case and 569 for the Chevron.

9 THE COURT: Thank you. If I need to look at them,  
05:12:02 10 thank you.

11 BY MR. KRATKA:

12 Q And, Mr. Metzger, were you satisfied with the results of  
13 those cases?

14 A Yes.

05:12:07 15 Q Why?

16 A The companies ultimately reduced their emissions by 95  
17 percent, so -- and together led to a reduction of about 1.1  
18 million pounds in pollution. So big improvement in air quality  
19 in addition to, you know, paying a penalty, admitting the  
05:12:29 20 responsibility. We were satisfied.

21 Q And was the 95 percent reduction in emissions you were  
22 referring to, was that unauthorized emissions?

23 A That's right.

24 Q And was the --

05:12:39 25 THE COURT: 95 percent under what -- from where, from

Metzger - Direct/Kratka

1 the date of settlement until then --

2 MR. KRATKA: You anticipated my next question, your  
3 Honor.

4 THE COURT: Go on. Go on.

05:12:51 5 BY MR. KRATKA:

6 Q What was the comparison level from which you computed that  
7 95 percent?

8 A It was based on a five-year average of emissions from the  
9 facilities, 95 -- 95 percent reduction from that five-year

05:13:04 10 average.

11 Q The five-year average prior to when the lawsuit -- each  
12 lawsuit was filed?

13 A Yes.

14 Q And are those consent decrees still in effect?

05:13:12 15 A No. They ended in November.

16 Q And are you aware of the --

17 THE COURT: I don't have them right in front of me,  
18 needless to say. What was the date that they were issued? Now,  
19 how long was it? In other words, how long a time was it until  
05:13:28 20 they're no longer in effect? I just don't have them in front of  
21 me.

22 THE WITNESS: It was a three-year consent decree.

23 THE COURT: Okay.

24 MR. KRATKA: Roughly three years for each.

05:13:37 25 //



Metzger - Direct/Kratka

1 BY MR. KRATKA:

2 **Q** And are you aware of the environmental performance of the  
3 Shell Deer Park facility after the termination of the Shell  
4 consent decree?

05:13:48 5 **A** Yes.

6 **Q** And do you have any concerns with Shell's performance once  
7 their consent decree ended?

8 **A** Yes.

9 **Q** What concerns do you have?

05:13:58 10 **A** They had at least one major emission event since the end of  
11 the consent decree involving a large amount of pollution.

12 **Q** Do you have any feeling about whether --

13 MR. KRATKA: Strike that.

14 BY MR. KRATKA:

05:14:14 15 **Q** Referring to those cases themselves, you were the director  
16 of Environment Texas at the time that both of those cases were  
17 brought?

18 **A** Yes.

19 **Q** And during the pendency of those cases, were -- and after  
05:14:28 20 the settlement of those cases, did the Texas Commission on  
21 Environmental Quality ever contact you to inform you that they  
22 felt those suits were intrusive on their work?

23 **A** No.

24 **Q** And did they ever contact you to let you know that those  
05:14:44 25 lawsuits in any way interfered with their enforcement?

Metzger - Direct/Kratka

1 **A** No, they did not.

2 **Q** Did the EPA ever contact you to let you know that either of  
3 those suits was either intrusive or interfering with their  
4 enforcement efforts?

05:14:59 5 **A** No.

6 **Q** Why did Environment Texas bring this lawsuit?

7 **A** Because Exxon, according to their own records, has exceeded  
8 their Clean Air Act permits thousands of times, putting out  
9 nearly 10 million pounds of pollution into the air above and  
05:15:25 10 beyond what they're legally allowed to and we feel that the  
11 state has not held them accountable for those violations and  
12 taken steps necessary to prevent them from continuing in the  
13 future.

14 THE COURT: Let me just mention to you: It's now  
05:15:40 15 about 5:15. I can go straight through to about 6:05, or if you  
16 need to, we'll take a five-minute break. You call it. What do  
17 you prefer doing? I mean, just five minutes.

18 MR. KRATKA: Let me ask just about three more  
19 questions and then take a five-minute break.

05:15:57 20 THE COURT: Absolutely.

21 MR. KRATKA: That will be a better breaking point.

22 THE COURT: Yeah.

23 BY MR. KRATKA:

24 **Q** Okay. Now, how did Environment Texas learn about the  
05:16:03 25 alleged violations that you're referring to?

Metzger - Direct/Kratka

1 **A** From the STEERS database.

2 **Q** And you are familiar with the STEERS database?

3 **A** Yes.

4 **Q** What is your understanding of what a STEERS report is?

05:16:14 5 **A** It's a report filed by a company when they have an emission  
6 event, so an unauthorized release of emissions above a certain  
7 quantity.

8 **Q** Have you seen STEERS reports yourself?

9 **A** Yes.

05:16:27 10 **Q** Are you familiar with the types of information contained in  
11 STEERS reports?

12 **A** Yes.

13 **Q** And have you reviewed STEERS reports that relate  
14 specifically to the Exxon Baytown Complex?

05:16:36 15 **A** Yes.

16 MR. KRATKA: And, your Honor, just to let the record  
17 reflect that for each of the three plants, Plaintiffs have put  
18 into evidence the STEERS reports underlying those stipulated  
19 tables as Plaintiffs' Exhibits 16, 17, and 18. And for those  
05:16:53 20 post September, 2013, events that we discussed on Friday, those  
21 are Exhibits 20, 21, and 22.

22 THE COURT: Uh-huh.

23 BY MR. KRATKA:

24 **Q** And are you familiar with the terms non-reportable or  
05:17:07 25 recordable emission events?

Metzger - Direct/Kratka

1 **A** Yes.

2 **Q** What is your understanding of a non-reportable or  
3 recordable emission event?

05:17:19

4 **A** That is an emission event that involved an unauthorized  
5 release of emissions but below a reportable quantity.

6 **Q** And, again, for the record, I'm sorry. You've reviewed  
7 Exxon's records of non-reportable emission events?

8 **A** Yes.

9 **Q** And you're familiar with the information they contain?

05:17:33

10 **A** Yes.

11 MR. KRATKA: And, again, your Honor, those have been  
12 submitted as Plaintiffs' Exhibits 101 through 112. This would  
13 probably be a good breaking point.

05:17:54

14 THE COURT: I have about 5:18. We'll get back in at  
15 5:25. We'll take about a five-minute break.

16 (Court recessed at 5:17 p.m.)

17 (Court resumed at 5:26 p.m.)

18 BY MR. KRATKA:

05:27:08

19 **Q** Mr. Metzger, are you familiar with the term "deviation  
20 report?"

21 **A** Yes.

22 **Q** And what is your understanding of what a deviation report  
23 is?

05:27:17

24 **A** It's a report filed I believe two times a year documenting  
25 deviations or violations with a Title 5 permit.

Metzger - Direct/Kratka

1 Q And have you reviewed Exxon's deviation reports for the  
2 Baytown Complex?

3 A Yes.

4 MR. KRATKA: And, your Honor, those reports which are  
05:27:28 5 the underlying documents for stipulated Tables 7A through 7E are  
6 in evidence as Plaintiffs' Exhibits 23 through 100.

7 THE COURT: All right.

8 BY MR. KRATKA:

9 Q Now, Mr. Metzger, are you familiar with -- generally with  
05:27:50 10 what Title 5 permits are?

11 A Yes.

12 Q And do you know whether Title 5 permits incorporate the new  
13 Source Review and Prevention of Significant Deterioration  
14 permits issued by the TCEQ?

05:28:03 15 A Yes, they do.

16 Q And do they incorporate them?

17 A Yes.

18 MR. KRATKA: And, your Honor, again, we've submitted  
19 into evidence all of the permits that are relevant to this case.  
05:28:13 20 The Title 5 permits are Plaintiffs' Exhibits 191 through 215 and  
21 222 through 252. That's overall the revisions to the permits.  
22 And the NSR and the PSD permits that are incorporated into them,  
23 which have also been revised many times, are -- for the period  
24 covered by this lawsuit are Plaintiffs' Exhibits 113 through 189  
05:28:40 25 and 216 through 221.

Metzger - Direct/Kratka

1 THE COURT: 221, okay.

2 BY MR. KRATKA:

05:28:54

3 Q Now, I just referred to a stipulation, Mr. Metzger. Are  
4 you aware that the parties have entered into a stipulation  
5 regarding the information and the reports we've just been  
6 discussing, STEERS reports, non-reportable emission events, and  
7 deviation reports?

8 A Yes, I am.

05:29:06

9 Q And have you reviewed the tables of information, the  
10 stipulated tables that the parties have entered into?

11 A Yes.

12 Q And just, again, this will probably be said a million  
13 times, but those are Plaintiffs' Exhibit 1A through 7E. And  
14 you're generally familiar with those tables?

05:29:22

15 A Yes.

16 Q And I want to turn your attention now to a number of  
17 summary charts in which calculations have been made of the days  
18 of violation, which those -- these numbers have been thrown  
19 around quite a bit.

05:29:39

20 MR. KRATKA: As your Honor has already heard.

21 BY MR. KRATKA:

05:29:53

22 Q And I want to ask you some questions about how these  
23 numbers were arrived at. If you would turn your attention to  
24 Plaintiffs' Exhibit 587, I'll hand you a copy of it, and also  
25 put the first page of it up on the screen.

Metzger - Direct/Kratka

1 THE COURT: Can you put it on the screen? Oh, that  
2 screen?

3 MR. KRATKA: Yes, sorry. Low tech here.

4 BY MR. KRATKA:

05:30:30 5 Q Mr. Metzger, have you seen this document before?

6 A Yes.

7 Q Can you tell the Court what this exhibit is?

8 A This is the calculation of numbered days of violations from  
9 our Plaintiffs' Exhibit 1A. It's nearly identical to the  
05:30:48 10 stipulated table; however, we added one column to the far right  
11 where we calculated the number of days of violations.

12 Q So if I could just -- if we could just show the Court  
13 exactly what you mean. You've taken the stipulated Table 1A  
14 which was STEERS events for the refinery under Count 1 --

05:31:11 15 A Yes.

16 Q -- and at the far right of this stipulated table, you've  
17 added a new column entitled "Number of Days of Violation"?

18 A Yes, that's right.

19 Q And at the top of this exhibit, there's some language up  
05:31:26 20 there. Can you tell the Court generally what that is up on top?

21 A Yes. So first we count one day of violation for each  
22 24-hour period. And so a violation that was less than 24 hours  
23 or 24 hours or less would be counted as one violation. If it  
24 were 30 hours, for example, that would be counted as two days of  
05:31:49 25 violations.

Metzger - Direct/Kratka

1 THE COURT: How do you count -- how do you do the  
2 multiple counting? How did you come to that?

3 THE WITNESS: If my understanding is -- under the law,  
4 each day of violation is -- each 24-hour period is considered a  
05:32:03 5 day, and each 24-hour period or each day then can be counted as  
6 a violation.

7 THE COURT: All right. But is it a continuing  
8 violation of the same -- excuse me.

9 You know what the positions are. Is this a  
05:32:17 10 continuing -- is this a continuing violation or each one  
11 independent for every day? Maybe I'm inarticulate.

12 MR. KRATKA: Yes.

13 THE COURT: You know what I was -- the point I'm --

14 MR. KRATKA: I'm going to be leading Mr. Metzger  
05:32:33 15 through a number of summaries that get precisely to that issue,  
16 and I apologize ahead of time. It's going to take a little bit  
17 of time.

18 THE COURT: Nope, nope. That's what we've got.  
19 That's why I have a timing order.

05:32:44 20 MR. KRATKA: Okay.

21 THE COURT: Go on.

22 MR. ALEXANDER: Your Honor, I apologize. May I take  
23 the witness on voir dire just very briefly?

24 THE COURT: Absolutely.

05:32:48 25 //



1 VOIR DIRE EXAMINATION

2 BY MR. ALEXANDER:

3 Q Mr. Metzger, did I hear you right to say that you  
4 personally did the work behind this -- this day, the violation  
05:32:56 5 table?

6 MR. KRATKA: We jumped ahead a second. I've got a  
7 couple of background --

8 THE COURT: All right. Let him lay some more  
9 predicate, and then get up if you still need that same point,  
05:32:57 10 Okay?

11 MR. KRATKA: Thank you, your Honor.

12 THE COURT: I understand you're entitled to it; but if  
13 he says he's going to get there, then you know what he had in  
14 mind.

05:33:10 15 MR. ALEXANDER: Understood, your Honor.

16 MR. KRATKA: I had a poorly worded question that  
17 allowed the witness to jump the order. So, I -- that's my  
18 fault.

19 DIRECT EXAMINATION

05:33:15 20 (continued)

21 BY MR. KRATKA:

22 Q What I meant to ask: Were there guidelines listed for  
23 counting days of violation? Is that what appears at the top of  
24 this table?

05:33:21 25 A Yes.

Metzger - Direct/Kratka

1 Q And did you yourself come up with these guidelines for how  
2 to count what constituted a day of violation?

3 A I did in concert with the legal team.

05:33:36

4 Q And without revealing the contents of any attorney/client  
5 communications, you participated in discussions with the legal  
6 team as to what constituted a day of violation?

7 A Yes, I did.

8 Q And do you understand the guidelines that were arrived at  
9 for this particular table?

05:33:50

10 A Yes.

11 Q But you also understand that it is ultimately this Court  
12 who will determine whether or not a particular violation  
13 actually occurred?

14 A Yes.

05:34:03

15 Q And did you play any role in actually going through this  
16 table and doing the computation of the days of violation?

17 A Yes. I authorized and reviewed the work of the paralegal,  
18 Mary Rock, who did much of the work.

05:34:17

19 Q And you did review these calculations after they were  
20 performed?

21 A Yes.

22 Q And you stated that you understand the -- how they were --  
23 these calculations were undertaken?

24 A Yes.

05:34:23

25 Q And are you able to answer questions about how these

Metzger - Direct/Kratka

1 calculations were made?

2 **A** Yes.

3 **Q** Okay. So now let's go back to the top of Exhibit 587  
4 itself and let me ask you some more specific questions. So,  
05:34:40 5 again, you just explained the first guideline about 24-hour  
6 periods?

7 **A** Yes.

8 **Q** And if you look down at row -- let's see -- Row 9, you got  
9 the rows on the table here. Row 9 of the first page of this  
05:35:08 10 exhibit. And this is for STEERS Event 66872. Can you explain  
11 why at the far right of Row 9 there is a number two on the days  
12 of violation column?

13 **A** Yes.

14 **Q** Would you explain?

05:35:24 15 **A** Yes. The duration of the event was 28 hours and ten  
16 minutes. So that was counted as two days' violations because it  
17 extended into a second day.

18 **Q** Okay.

19 MR. ALEXANDER: Mr. Kratka, I apologize.

05:35:37 20 May I interrupt for just a second, your Honor?  
21 They have not offered this document into evidence. And I  
22 understand the Court's procedure. We're not objecting to it  
23 because it's not a jury trial, but I just want to note for the  
24 record that, although we don't object to the document, we're not  
05:35:50 25 acceding to the arguments they've got here at the top that

Metzger - Direct/Kratka

1 they're going through with regard to how to calculate a day of  
2 violation of those --

3 THE COURT: I understand.

4 MR. ALEXANDER: Thank you, your Honor.

05:36:00 5 BY MR. KRATKA:

6 Q And if you'd turn to the second guideline at the top of  
7 this exhibit, can you explain to the Court what that's about?

8 A Yeah. The permit for the refinery regulates emissions on a  
9 pollutant-by-pollutant basis. So, we calculated each pollutant

05:36:25 10 separately except for VOCs which are grouped together in the  
11 permit except for benzene which is regulated separately, and  
12 oxide and nitrogen are also grouped together as a pollutant.

13 Q So if you look back down again at Row 9 of this exhibit  
14 under the contaminant column, there's a grouping of a number of  
05:36:44 15 different volatile organic compounds as total VOCs. Under the  
16 contaminant column, there's a listing for total VOCs. Is that  
17 what you're referring to as a grouping of a number of different  
18 pollutants?

19 A Yes.

05:37:14 20 Q And that entire group would be counted as a single  
21 pollutant when you were computing days of violation?

22 A That's right.

23 Q Again, this is from the original stipulated table of the  
24 parties?

05:37:27 25 A Yes.

Metzger - Direct/Kratka

1 **Q** And then going to the third guideline at the top of the  
2 page for determining what constituted days, a day of violation,  
3 can you describe what the third guideline is?

05:37:47

4 **A** Yes. The every emission limit is considered to be zero  
5 because the refinery permits specifically says that no upset  
6 emissions are allowed.

7 THE COURT: Say that again. I don't understand.  
8 Just --

05:37:56

9 THE WITNESS: Sure. The permit for the refinery  
10 specifically states that no amounts of upset emissions are  
11 allowed. So we counted the emission limit as zero because of  
12 that.

13 THE COURT: Oh, the limit. Okay.

14 THE WITNESS: Yes.

05:38:07

15 BY MR. KRATKA:

16 **Q** So if any amount was emitted of a particular pollutant, it  
17 was compared to a limit of zero?

18 **A** Right.

05:38:18

19 **Q** And that's, again, just for Count 1 involving upset events  
20 at the refinery?

21 **A** That's right.

22 **Q** And then the fourth rule, the guideline for counting days  
23 of violations, can you describe that for the Court?

05:38:30

24 **A** Sure. We only counted one violation per day for each  
25 pollutant released in an emission event regardless of the -- how

Metzger - Direct/Kratka

1 many emission points there were from the same event. That's  
2 because the flex permit groups all emission sources together.

3 **Q** Can you describe for the Court what you mean by "flex  
4 permit"?

05:38:45 5 **A** Yes. A flex permit, basically, aggregates the pollution  
6 limits for multiple sources into one facility-wide cap on  
7 emissions.

8 **Q** So, for example, all sources of sulfur dioxide would be  
9 grouped together under a single emission limit?

05:39:05 10 **A** Yes.

11 **Q** When you say "flex permit" or "flex cap," is that short for  
12 flexible permit?

13 **A** Yes, it is.

14 **Q** And those are issued by the TCEQ?

05:39:12 15 **A** Yes.

16 **Q** And then to illustrate that, if you flip to page 3 of the  
17 exhibit -- well, actually pages 2 and 3 of this exhibit on the  
18 far right column, you'll see entries that say "already counted"  
19 under the "Days of Violation" column?

05:39:45 20 **A** Yes.

21 **Q** What does "already counted" mean?

22 **A** That means we had already counted that pollutant as a day  
23 of violation and because under our methodology we won't count it  
24 as a second time because it's covered under that same flex  
05:40:01 25 permit.

Metzger - Direct/Kratka

1 Q So if sulfur dioxide were emitted from three different  
2 flares in the same emission event, you only counted it once?

3 A That's right.

4 Q And I want you to turn your attention -- if you would, flip  
05:40:25 5 to the next exhibit which will be Plaintiffs' Exhibit 588.

6 MR. KRATKA: And if your Honor recalls the very small  
7 print on --

8 MR. ALEXANDER: I apologize, your Honor. I think the  
9 point is amply made, but with regard to Exhibit 588, just like  
05:40:52 10 587, although we're not objecting to the exhibit, we're not  
11 acceding in any way to the --

12 THE COURT: Don't worry about it. That's a  
13 continuing -- it's a running objection. Let's go.

14 MR. ALEXANDER: Thank you, your Honor.

05:41:01 15 BY MR. KRATKA:

16 Q Can you explain to the Court what Exhibit -- have you seen  
17 Exhibit 588 before?

18 A Yes.

19 Q Can you tell the Court what this exhibit is?

05:41:09 20 A This, again, is a stipulated table from our Exhibit 1B.  
21 However, we added one column which is "Number of days of  
22 Violations" on the far right.

23 Q And so this is the stipulated Table 1B which is recordable  
24 emission events at the refinery under Count 1 of the complaint?

05:41:27 25 A Yes.

Metzger - Direct/Kratka

1 Q And, again, you added a single column computing numbers of  
2 days of violation?

3 A Yes.

4 Q And did you play the same role in participating in the  
05:41:37 5 production and review of this table as you did with the previous  
6 one?

7 A Yes, I did.

8 Q And you're able to answer questions about how these  
9 calculations were performed?

05:41:45 10 A Yes.

11 Q And looking again at the rules for counting on top, are  
12 they -- since it's both under Count 1, are the rules the same as  
13 we just discussed for Table 1 -- for Plaintiffs' Exhibit 587?

14 A Yes.

05:42:00 15 Q And we -- I believe this came up before when your Honor was  
16 looking at the original stipulated table of these recordable  
17 emission events, some of which involve small amounts of  
18 emissions. Can you explain why Environment Texas is even  
19 bothering to sue over such small emission amounts?

05:42:24 20 A Yes.

21 Q Can you do so?

22 A If it were, you know, five emission events involving half  
23 pound, then we wouldn't be suing over this; but this is, I  
24 think, 287 pages of small nice print that together adds up to  
05:42:39 25 more than or almost a million and quarter pounds of pollution.



Metzger - Direct/Kratka

1 So together it adds up to a huge amount; and I think it, you  
2 know, goes to show that Exxon's not running the facility very  
3 well, that they're having, you know, these emission events over  
4 and over and over again.

05:42:59 5 **Q** Now, if you flip down to page 7 of this exhibit, this  
6 particular event again was mentioned earlier. Row 270, which is  
7 only on page 7, can you explain why there is a 12 in the far  
8 right column under number of days of violations?

9 **A** Yes.

05:43:23 10 **Q** Please go ahead and do so.

11 **A** Because the event lasted 272 hours, so that counts as up to  
12 about 12 days.

13 **Q** And what was the total amount of pollutants released in  
14 this event?

05:43:44 15 **A** 20,533 pounds of carbon monoxide.

16 **Q** So this is a 20,000-pound recordable emission event?

17 **A** Yes.

18 **Q** If you flip to the last -- very last page of the exhibit --  
19 I should have done this for the previous one as well -- is there  
05:44:03 20 a total under the days of violation column?

21 **A** Yes.

22 **Q** And what page of the exhibit is that?

23 **A** Page 287.

24 **Q** That's 287 pages of recordable emission events. And what  
05:44:16 25 was total number of days of violation?

Metzger - Direct/Kratka

1 **A** 9,390.

2 **Q** And that's what you had computed -- or the Plaintiffs had  
3 computed for number of days of recordable emission violations  
4 under Count 1?

05:44:34 5 **A** Yes.

6 MR. KRATKA: So why don't we flip right back to  
7 Exhibit 587 and look at the last page there. Got that up on the  
8 screen now.

9 THE COURT: That's the prior one?

05:44:53 10 MR. KRATKA: That's the prior one.

11 BY MR. KRATKA:

12 **Q** This is the last page of Plaintiffs' Exhibit 587, which  
13 totals the number of violations for STEERS events under Count 1?

14 **A** Yes.

05:45:04 15 **Q** And what is the total?

16 **A** 1,359 days of violations.

17 **Q** Okay. Were you in the courtroom earlier when Mr. Nichols  
18 was giving his opening statement for Exxon?

19 **A** Yes.

05:45:25 20 **Q** And did you hear the argument regarding whether  
21 Plaintiffs -- the argument about Plaintiffs having to prove  
22 repeated violations?

23 **A** Yes.

24 **Q** Let me show you Plaintiffs' Exhibit 9. And have you seen  
05:46:05 25 this document before?

Metzger - Direct/Kratka

1 **A** Yes.

2 **Q** Can you tell the Court what this document is?

3 **A** This summarizes the number of days of violations from both  
4 the STEERS events and the recordable events at the refinery as  
05:46:19 5 presented in Exhibit 587 and 588.

6 **Q** And did you play any role in creating this summary table?

7 **A** Yes.

8 **Q** What role did you play?

9 **A** I authorized and reviewed the creation of the table.

05:46:32 10 **Q** And are you able to answer questions about how the  
11 summaries were arrived at?

12 **A** Yes.

13 **Q** Can you describe for the Court what this first section,  
14 which is called calculation of statutory maximum penalty, is?

05:46:48 15 **A** Yes.

16 **Q** Again, actually before you do -- again, this -- this  
17 summary table relates to which exhibits?

18 **A** 587 and 588.

19 **Q** So those are the ones we just looked at regarding  
05:47:04 20 calculating days of violation?

21 **A** Yes.

22 **Q** Okay. And what -- what's being done here in this first  
23 section called calculation of statutory maximum penalty?

24 **A** We documented the days of violations from both STEERS and  
05:47:19 25 recordables events occurring before January 12, 2009, which was

Metzger - Direct/Kratka

1 the date that EPA raised the maximum penalty. So prior to  
2 January 12, 2009, the maximum daily penalty was 32,500; and  
3 after January 12, 2009, the maximum penalty was 37,500.

4 THE COURT: Who set those amounts?

05:47:47

5 THE WITNESS: EPA. So then we calculated or  
6 multiplied the maximum penalty per day times the number of days  
7 of violations to arrive at the total maximum penalty.

8 BY MR. KRATKA:

05:48:02

9 Q So this is a calculation of the maximum possible penalty  
10 that could be awarded for Count 1?

11 A Yes.

12 Q And the totals here for the -- under each of these columns,  
13 these are taken from the -- those two counting tables or  
14 calculating tables, for lack of a better word, that we just went  
15 through?

05:48:22

16 A Yes.

17 Q Okay. And then please describe for the Court the second  
18 section of this summary exhibit which is entitled "Repeated  
19 Violations of Emission Limits, Refinery Flexible Permit 18287."

05:48:38

20 A Here we went through pollutant by pollutant from both the  
21 STEERS and recordables records and documented how many  
22 violations there were both before we filed the complaint and  
23 after we filed the complaint --

24 Q And --

05:48:55

25 A -- and then totals thereof.

Metzger - Direct/Kratka

1 Q Okay. And you testified a moment ago that permit -- that's  
2 listed here Permit 18287 for the refinery is a flexible permit?

3 A Yes.

4 Q And the refinery flexible permit has flexible emission  
5 caps?

6 A Yes.

7 Q So, what does that mean? If there's a limit for sulfur  
8 dioxide, what does that emission cap apply to at the refinery?

9 A That means that we only counted that pollutant once and so  
10 we didn't -- even if there were emissions of the same pollutant  
11 from multiple sources, we only counted that as, you know, one  
12 day of violation.

13 Q And because it's a flexible permit cap, does it matter  
14 which source caused the violation of the cap in terms of whether  
15 a violation occurred?

16 MR. ALEXANDER: Your Honor, I'm sorry, I think we're  
17 treading into legal areas now for which this witness is not  
18 qualified.

19 THE COURT: Overruled. Ask the question again.

20 BY MR. KRATKA:

21 Q Yeah. I'll ask it again. For purposes of your  
22 computations and summary of the stipulated tables, did it matter  
23 in your counting whether or not -- which emission point was the  
24 source of the violation of a particular flexible cap?

25 A No.

Metzger - Direct/Kratka

1 **Q** I may have asked this already -- and I apologize if I  
2 did -- but can you explain again what a flexible cap and a  
3 flexible permit is?

05:50:52

4 **A** Yes. It's the total facility-wide cap on emissions for a  
5 certain pollutant no matter what source it came from.

6 **Q** So every source -- so if we're using sulfur dioxide as an  
7 example, every listed source of sulfur dioxide is grouped  
8 together and combined under a single emission limit for sulfur  
9 dioxide?

05:51:07

10 **A** Yes.

11 **Q** And so when you counted violations of that limit, it didn't  
12 matter which source was the listed cause of that violation,  
13 correct?

05:51:22

14 **A** Right. Because any exceedance is a violation no matter  
15 what the source if it exceeded the facility-wide cap.

16 **Q** And, so, just to show the Court, the second page of the  
17 exhibit, you went through all the different pollutants that was  
18 emitted separately during emission events, upset events at the  
19 refinery?

05:51:38

20 **A** Yes.

21 **Q** And you testified earlier that the refinery permit through  
22 the maximum allowable emission -- let's backtrack again. Are  
23 you familiar with the term "maximum allowable emission rate  
24 table"?

05:51:51

25 **A** Yes.

Metzger - Direct/Kratka

1 Q And what is that?

2 A That is a table showing how much pollution per hour is  
3 allowed from -- for a pollutant.

05:52:06

4 Q And the maximum allowable emission rate table for the  
5 refinery sets those limits by each pollutant?

6 A Yes.

7 Q Okay. If you'll turn your attention to -- we're going to  
8 move on to Count 2 -- Plaintiffs' Exhibit 589.

05:52:30

9 THE COURT: Let me ask you this: If you want to stop  
10 at this point, if it's a good stopping pointing, we can do that.  
11 It's strictly up to you because we can go to 6:05. If you want  
12 to get in some more, that's fine. I have no problem.

13 MR. KRATKA: Let's try to get in one more.

14 THE COURT: Absolutely.

05:52:43

15 MR. KRATKA: Or two if we can, if I'm efficient.

16 MR. ALEXANDER: Mr. Kratka, what document did you just  
17 reference?

18 MR. KRATKA: Plaintiffs' Exhibit 589.

19 MR. ALEXANDER: Thank you.

05:52:53

20 BY MR. KRATKA:

21 Q Will you turn to that -- yeah, in the other volume.

22 Mr. Metzger, can you identify this exhibit for  
23 the Court?

24 A Yes. Again, this is the -- largely drawn from the

05:53:21

25 stipulated table in our Exhibit 2A -- stipulated table -- sorry,

Metzger - Direct/Kratka

1 Plaintiffs' Exhibit 2A. And we added a column on the far right  
2 calculating the number of days of violations.

3 **Q** So, again, like with the Count 1 tables, you added a single  
4 "Days of Violation" column to the stipulated table?

05:53:37 5 **A** Yes.

6 **Q** And did you have the same role in preparing this  
7 document -- in the creation of this document that you testified  
8 to with respect to the Count 1 tables?

9 **A** Yes.

05:53:53 10 **Q** And if we look up to the guidelines -- we're under a  
11 different count now. And it looks like some of these guidelines  
12 are a little different for how days of violation were computed.

13 **A** Yes.

14 **Q** Did you still determine -- in terms of duration, did you  
05:54:15 15 still use the 24-hour period to determine number of days of  
16 violation?

17 **A** Yes.

18 **Q** And did you still go pollutant by pollutant in terms of  
19 looking at categorizing days of violation?

05:54:29 20 **A** Yes.

21 **Q** Similarly to the previous count?

22 **A** Yes.

23 **Q** And you testified that for Count 1 the emission limit was  
24 assumed -- was assumed to be zero because of upset prohibition  
05:54:45 25 at the refinery. And for Count 2 how did you determine whether



Metzger - Direct/Kratka

1 an emission limit was exceeded?

2 **A** Well, so, first, if the emission limit in the permit was  
3 zero, then we counted that as a violation.

05:55:07

4 **Q** And so the column here on reported emission limit -- I got  
5 to slide it.

6 **A** Yes. So if the amount released was greater -- or so that  
7 it was counted as zero, then any emission was a violation.

05:55:28

8 **Q** And if the -- if the limit column contained a number, an  
9 actual limit rather than zero, what did you do to determine  
10 whether a violation occurred?

05:55:51

11 **A** First, if a -- under the authorization column it stated  
12 that the -- it was not specifically authorized, we counted that  
13 as a violation or if it -- the column -- Exxon stated that only  
14 portions were authorized, that means then that portions were not  
15 authorized since we counted that as a violation. And then,  
16 finally, if the amount released was larger than the number  
17 divided -- so the amount released divided by the number of hours  
18 of the event were greater than the reported emissions limit,  
19 then we counted that as a violation.

05:56:13

20 **Q** So you determined -- so in those cases you determined the  
21 actual emission rate during the event?

22 **A** Yes.

23 **Q** Pounds per hour?

24 **A** Yes.

05:56:19

25 **Q** And you compared that rate to the permit limit?

Metzger - Direct/Kratka

1 **A** Yes.

2 **Q** And if the emission rate was larger than the permit rate,  
3 you counted a violation?

4 **A** Yes.

05:56:29 5 **Q** And, again, similarly you -- because of the flexible permit  
6 issue, you grouped multiple sources of the same pollutant  
7 together and just counted them once?

8 **A** Yes.

9 **Q** So let's just go through a couple of examples for the  
05:56:45 10 Court. Look at the bottom of page 2 of this exhibit. Now, do  
11 you see in the far right-hand column, which is "Days of  
12 Violation," there is nothing listed here? Can you explain why?

13 **A** Yes. Because the amount released was less than the  
14 emission limit, the emission rate.

05:57:13 15 **Q** So for those pollutants for this event, no violation was  
16 counted?

17 THE COURT: You are saying "rate." What do you mean  
18 by "rate"?

19 THE WITNESS: The hourly rate from the permit.

05:57:24 20 THE COURT: The permissible rate?

21 THE WITNESS: The permissible rate. So in this case  
22 it was less than that. So we didn't count it as a violation.

23 BY MR. KRATKA:

24 **Q** And then just for another example, if you could flip to  
05:57:38 25 page 27 of this exhibit. I'm going to put that up on the

Metzger - Direct/Kratka

1 screen.

2 MR. KRATKA: I'm sorry. If I zoom in, we're going to  
3 miss some of the columns.

4 THE COURT: That's all right.

05:57:51 5 BY MR. KRATKA:

6 Q Looking again at the highlighted items, can you explain why  
7 there's no violations, no days of violation counted for ammonia  
8 and total VOCs for this event?

9 A Because under authorization, it says all emissions were  
05:58:09 10 authorized by Permit 18287. So we counted -- we didn't count  
11 that as a violation.

12 Q Okay. And then -- but for this same event benzene was  
13 counted as a violation. Can you explain why there's a nine in  
14 the benzene column?

05:58:24 15 A Yes. Because under authorization Exxon stated that only --  
16 only 34 pounds of the 442 pounds were authorized. So that means  
17 that the rest were not authorized.

18 Q And then how long did that violation last?

19 A 202 hours.

05:58:42 20 Q So that was counted as nine days of violation just for the  
21 pollutant benzene?

22 A Yes.

23 Q If you could flip to Plaintiffs' Exhibit 590 -- I'm sorry.  
24 Let me just go back for one second. Turn to the last page of  
05:59:14 25 Exhibit 589. Can you just -- can you tell the Court what the

Metzger - Direct/Kratka

1 total number of days of violation for Count 2 STEERS events at  
2 the refinery is?

3 **A** 1,218 days of violation.

4 **Q** And that's a lower number than under Count 1. Is that  
05:59:37 5 because the emission limit was not always assumed to be zero?

6 **A** Yes.

7 **Q** And if you look to Plaintiffs' Exhibit 590, is this the  
8 same calculations for -- performed for refinery recordable  
9 events under Count 2?

05:59:57 10 **A** Yes.

11 **Q** And that was done under the same guidelines as STEERS  
12 events under Count 2?

13 **A** Yes.

14 **Q** And, again, the total of -- total number of violations is  
06:00:09 15 shown on the last page of that exhibit?

16 **A** Yes, it is.

17 **Q** And what's that total?

18 **A** 6,723 days of violations.

19 **Q** Okay. So these first two exhibits under Count 2 dealt with  
06:00:28 20 refinery STEERS events and refinery recordable events; and if  
21 you would turn your attention to --

22 MR. KRATKA: The next four exhibits, your Honor, maybe  
23 we can kind of save a little time.

24 BY MR. KRATKA:

06:00:39 25 **Q** Exhibits 591 through 594, do those perform the same

Metzger - Direct/Kratka

1 calculations for olefins plant STEERS events under Count 2,  
2 olefins plant recordable events, chemical plant STEERS events,  
3 and chemical plant recordable events under Count 2? Those  
4 exhibits perform the days of violation calculations in the same  
5 manner as you've just described?

06:01:21

6 **A** Yes.

7 **Q** And you participated in the creation of those tables in the  
8 same way that you did for the previous tables we've discussed?

9 **A** Yes.

06:01:43

10 THE COURT: I'll make it easy. It's 6:02. I'm going  
11 to stop the clock. Hang on one second. I'll give you your  
12 totals in a moment. You can step down, sir.

13 THE WITNESS: Thank you.

06:02:09

14 THE COURT: All right. I want the staff up here. I  
15 always get them to help me with the numbers, make sure I have  
16 them right.

17 All right. We got a lot in today. Defendant had  
18 two hours and two minutes. The Plaintiff, three hours and 45  
19 minutes. Take a look at the sheet, how I'll do it; and the  
20 number in parenthesis are those times in minutes so you can keep  
21 track of them; and you can see your total minutes are up at the  
22 top together with hours.

06:03:19

23 Thank you for moving it along. We'll see you  
24 tomorrow at 10:00 a.m.

06:03:32

25 (Court recessed for the day at 6:03 p.m.)

## C E R T I F I C A T E

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter, to  
the best of my ability.

By: /s/ Gayle L. Dye

04-15-2014

Gayle L. Dye, CSR, RDR, CRR

Date